15 C*. de

REPORTS
OF
CASES

ARGUED and DETERMINED
IN THE
COURT OF KING's BENCH,
FROM
Michaelmas Term 37 GEORGE III. 1796,
TO
Trinity Term 38 GEORGE III. 1798,
BOTH INCLUSIVE.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

By CHARLES DURNFORD AND EDWARD HYDE EAST,
OF THE TEMPLE, ESQRS. BARRISTERS AT LAW.

Si quid noviſti rectius iſtis,
Candidus imperti; ſi non, his utere mecum. HOR.

VOL. VII.

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1798.

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JUDGES

OF THE

COURT OF KING's BENCH

During the Time of theſe REPORTS.

Right Honourable LLOYD Lord KENYON, Lord Chief Juſtice.
Honourable Sir WILLIAM HENRY ASHHURST, Knt.
Honourable Sir NASH GROSE, Knt.
Honourable Sir SOULDEN LAWRENCE, Knt.

Sir JOHN SCOTT, Knt. Attorney-General.
Sir JOHN MITFORD, Knt. Solicitor-General.

JUDGES

of the

COURT OF KING'S BENCH

During the Time of these Reports.

The Honourable Lloyd Lord Kenyon, Lord Chief Justice.
Honourable Sir William Henry Ashhurst, Knt.
Honourable Sir Nash Grose, Knt.
Honourable Sir Soulden Lawrence, Knt.

Sir John Scott, Knt. Attorney-General.
Sir John Mitford, Knt. Solicitor-General.

A

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OF THE

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AND

MANUSCRIPT CASES CITED

IN THE SEVENTH VOLUME.

N. B. Thoſe Caſes which are printed in *Italics*, and have the letter *v.* added, were cited from MS. Notes.

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ERRATA ET ADDENDA.

Vol. I.

Page 453. lines 22 and 23. *for* " appointment" *read* " apportionment"

Vol. VI.

26. —— 21. *after* " conditionally" *add* " and notice was ſtuck up in the office"; and after " *notice*" in the 4th line of the margin *add* " ſtick up notice there"
27. —— 21. *for* " filed" *read* " ſtuck up notice of"
544. —— 23. *for* " Mr. Deeds" *read* " Mr. Deaves"
738. —— 28. *tranſpoſe* " fourth" *and* " firſt"
Index, Swinnerton v. Jarvis for " 62" *read* " 12"

Vol. VII.

51. line 31. *for* " the ceſtui que truſt" *read* " his truſtee"
66. note, *for* " ante, 6 vol. 54." *read* " ante, 6 vol. 52"
100. line 5. *for* " ante, 5 vol." *read* " ib."
282. laſt line but five in the margin, *for* " before" *read* " for"
305. line 17. *for* " contracted" *read* " due"
316. in note, laſt line but four, *for* " have" *read* " having"
336. —— 20 and 21. *for* " the defendant" *read* " Mr. Allen"
371. —— 17. *dele* " not"
382. n. (*a*) *for* " 1 Bl. Rep. 90." *read* " 1 Bl. Rep. 190"
386. line 12. *after* " Sarah Keen" *ſtrike out the full point, and add it after the defendant*"
Ib. —— 12 and 13. *ſtrike out the parentheſis including* " the defendant's mother"
402. —— 29 *for* " 20,000 l." *read* " 30,000l."
439. —— 19. *for* " Hutton" *read* " Hulton"
Ib. —— 32. *for* " 1 vol. 253." *read* " 3 vol. 253."
449. n. (*b*) *for* " ante, 5 vol. 12." *read* " ante, 6 vol. 12."
495. —— 22. *for* " Chombre" *read* " Chambre"
612. in margin, " A." *for* " B." *and* " B." *for* " A." *after the two firſt lines.*

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term

In the Thirty-ſeventh Year of the Reign of GEORGE III.

ANSELL *againſt* EVANS.

Wedneſday, Nov. 9th.

The Court have no authority by 9 & 10 *W.* 3. *c.* 15. to make a parol ſubmiſſion to an award a rule of court.

AN award having been made in this caſe under a verbal agreement by the parties to refer all matters in difference,

Mackaneſs now moved to make the ſubmiſſion a rule of court, to which

Bailey on the other ſide was inſtructed to conſent. But

The Court thought they had no authority under the ſtatute 9 & 10 *W.* 3. *c.* 15., which gives juriſdiction in this caſe, to grant the motion; that ſtatute requiring that the parties agreeing that their ſubmiſſion to the award ſhould be made a rule of court, and that ſuch their agreement ſhould be inſerted in their ſubmiſſion, or the condition of the bond or promiſe, *&c.* And therefore they

Refuſed the rule.

Thurſday, Nov. 10th.

DOE on the Demiſe of BOWERMAN *againſt* SYBOURN.

The Jury may preſume an old ſatisfied term ſurrendered to the *ceſtuy que uſe*, in order to ſubſtantiate a leaſe executed by him.

A bill in Chancery is no evidence of the facts contained therein, not even of thoſe on which the prayer of relief is founded.

THE premiſes for which this ejectment was brought had been mortgaged in 1760, by *Nicholas Stoddard* to *George Pym*, for a term of one hundred years, ſubject to a proviſo of redemption on payment of the principal ſum of 400*l.* and intereſt thereon, within ſix months. *Stoddard* died in 1765; and the year following, the mortgage money not having been paid, the mortgagee got into poſſeſſion, and in 1770 aſſigned the remainder of the term to *W. Holt* in truſt for him *George Pym;* and in the ſame year, by indentures of leaſe and releaſe, and feoffment, conveyed the premiſes to *H. Holt*, and his heirs, to the uſe of him *G. Pym* in fee, and afterwards levied a fine of the ſame to the uſe of himſelf in fee. The leſſor of the plaintiff, who is the heir at law of the mortgagor, in 1778 filed a bill in Chancery againſt *G. Pym*, for an account, and in order to redeem; to which the latter appeared, but died before any anſwer was put in, having by his will deviſed the premiſes as freehold in truſt to *W. Roman*, *H. Holt*, and *F. Hilton*, to the uſe of his natural ſon *John Pym*, and to convey the ſame to the ſaid *J. Pym* in fee, on his attaining his age of twenty-one years. The ſuit in Chancery was revived in 1790 againſt the legal repreſentatives of *G. Pym*, and a decree of redemption was obtained in 1794, in favour of *Bowerman;* and amongſt other things the Court directed the defendant *Sybourn*, who was the tenant in poſſeſſion, to attorn to *Bowerman*, which he accordingly did.

At the trial of this ejectment before Lord *Kenyon* Ch. J. at the laſt Aſſizes for *Kent*, the defendant ſet up a leaſe from *J. Pym*, dated 16th *October* 1789, executed after he came of age, whereby he demiſed the premiſes to the defendant for eighty-one years, to commence from 16th *February* 1791, when his former leaſe expired. Againſt this it was objected on the part of the leſſor of the plaintiff, that it did not appear that *J. Pym* had the legal eſtate in him at the time, but that it was then outſtanding in his truſtee, without whoſe concurrence no legal title could be conveyed: and his counſel offered in evidence a bill in Chancery, filed in 1790 by the preſent defendant in conjunction with

J. Pym

J. Pym againſt *Bowerman* and *H. Holt*, the ſurviving deviſee in *G. Pym*'s will, ſtating among other things a leaſe to *Sybourn* of the premiſes from *W. Holt* and *G. Pym* for twenty-one years from the 16th *February* 1770, *which bill prayed a conveyance of the legal eſtate to John Pym, and that H. Holt might be reſtrained from compelling Sybourn to pay his rent to him*: this bill was afterwards diſmiſſed at the time of the decree for redemption. But Lord *Kenyon*, Ch. J. rejected this evidence at the trial, upon the ground that a bill in Chancery was not evidence of any fact therein contained, but was to be taken merely as the ſuggeſtion of counſel; and he thought that the jury might preſume a legal conveyance from the truſtees to *J. Pym* upon his coming of age, purſuant to the terms of the truſt; upon which the plaintiff ſubmitted to a nonſuit.

Shepherd, Serjt. now urged, upon a motion to ſet aſide the nonſuit, that there was a diſtinction in this reſpect between facts ſtated by way of inducement in a bill of equity, and ſuch matter whereon the plaintiff founds his prayer for relief, as in the preſent caſe. And he cited *Bull. Ni. Pri.* 236. where ſuch a diſtinction is taken. But by

Lord Kenyon Ch. J. A bill in Chancery is never admitted in evidence (*a*) further than to ſhew that ſuch a bill did exiſt, and that certain facts were in iſſue between the parties, in order to let in the anſwer or depoſitions of the witneſſes. And as to the preſumption which he had directed the jury to make, he ſaid he had grounded himſelf upon the doctrine laid down by Lord *Mansfield* in *Lade* v. *Holford* (*b*); which was not, as had been ſuppoſed, that an ejectment might be maintained upon a mere equitable title, which would remove ancient land-marks in the law and create great confuſion (*c*); but that in all caſes where truſtees ought to convey to the beneficial owner he would leave it to the Jury to preſume, where ſuch a preſumption might reaſonably be made, that they had conveyed accordingly, in order to prevent a juſt title from being defeated by a matter of form. And this had not only been ſo held by Lord *Mansfield*, but before his time by Mr. Juſtice *Gundry*, at *Hereford*. And he thought this rule, as far as it went, highly convenient and proper.

Per Curiam, Rule refuſed.

See also Hillary v. Waller before Sir Wm Grant Master of the Rolls in Mr Sugden's book 2. ed. 528.

(*a*) In *Taylor* v. *Cole*, *Weſtm.* Sittings after *Hil.* term 1789, His Lordſhip held the ſame doctrine, with the exception that a bill in Chancery by an anceſtor was evidence to prove a family pedigree ſtated therein, in the ſame manner as an inſcription on a tombſtone or in a Bible.

(*b*) *Bull. Ni. Pri.* 110.

(*c*) Vid. *Goodtitle* d. *Jones* v. *Jones*, *pag.*

Thurſday, Nov. 10th.

If the plaintiff prove a cauſe of action before the bill filed though after the writ ſued out, it is ſufficient as well in the caſe of bailable as common writs.

Best *againſt* Wilding.

THE plaintiff declared for the uſe and occupation of certain premiſes, the rent of which became due on the 5th *April* 1796. The defendant at the trial proved that the writ on which he had been held to bail was ſued out the day before the rent became due; and contended that the plaintiff ought to be nonſuited, as having ſued before his cauſe of action had accrued; for that there was a difference between this caſe of a bailable writ, and the caſe of *Foſter* v. *Bonner* (*a*), which was not ſo; and where the Court had held that the latitat was merely proceſs to bring the party into Court, and that it was ſufficient for the plaintiff to prove any cauſe of action before the bill filed. But Lord *Kenyon* Ch. J. over-ruled the objection at the trial at the laſt Aſſizes at *Maidſtone*, thinking that there was no material difference between the two caſes; and the plaintiff recovered a verdict. Now

'*Eſpinaſſe* having moved to ſet aſide the verdict on the ſame ground,

The Court confirmed his Lordſhip's direction; adding that in a bailable writ the latter clauſe is "and alſo to anſwer to a bill "*to be filed*." They therefore

Refuſed the rule.

(*a*) *Cowp.* 454.

Thurſday, Nov. 10th.

An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is *falſe*.

The King *againſt* Burks.

THE defendant having been convicted on an information filed againſt him by his Majeſty's Attorney General for a libel,

Vaughan, F. moved on a former day in this term to arreſt the judgment, for two objections appearing on the information; 1ſt. That the information does not charge the offence to have been committed *vi et armis*; 2dly. That the libellous matter is not ſaid to be *falſe*. 1ſt. That the addition of the former words was neceſſary at common law appears by the ſtatute 37 *Hen.* 8. *c.* 8., which was paſſed to prevent advantage being taken of the defect ariſing from the omiſſion of thoſe words in indictments and inquiſitions: but that ſtatute does not extend to *informations*. 2 *Hale P. C.* 187. Secondly, The word "falſe" is to be found in moſt of the precedents

1796.

The King *againſt* Burks.

cedents of indictments or informations for a libel, particularly in the more ancient ones.

The Court were ſtrongly inclined to over-rule both theſe objections, but granted a rule to ſhew cauſe, in order that the precedents might be examined: but on this day they ſaid that upon examination they were perfectly ſatisfied that there was no weight in either of the objections, and therefore they thought it unneceſſary to have the rule drawn up, unleſs the defendant's counſel on further conſideration ſhould deſire to argue the points.

As to the firſt objection; they ſaid that the paſſage cited from 2 *Hale* was correct, namely, that the ſtatute 37 *H.* 8. did not extend to informations: but that an indictment for a libel before that ſtatute would have been good without the words *vi et armis;* for that a libel was not in itſelf an actual breach of the peace, but only tended to a breach of it. That the diſtinction taken in 2 *Hawk. c.* 25. *ſ.* 90. between indictments for offences which amount to an actual diſturbance of the peace, as reſcues, aſſaults, &c., and thoſe for conſpiracies, cheats, ſlanders, eſcapes, &c., was the true diſtinction; and that in the former only the words *vi et armis* were neceſſary. That though ſome of the precedents in *Tremaine* contained the words *vi et armis*, yet that thoſe words were omitted in the greater number of them as well as in moſt of the precedents in modern times. That in *R.* v. *Eades* (*a*) thoſe words were omitted; and though ſeveral objections were taken in arreſt of judgment (*b*), no objection was made on that account. Neither was any objection taken in *R.* v. *Tutchin* (*c*) for the omiſſion of thoſe words, though other objections were taken in that caſe. And that in *R.* v. *Franklin* (*d*) judgment was given againſt the defendant on an information for a libel, where theſe words were omitted.

And that, as to the other objection, the greater number of precedents in late times was without the epithet *falſe;* and that the reaſon of the thing alſo was againſt the inſertion of the word "falſe," becauſe it is not neceſſary to prove the libel to be falſe.

The Court therefore deſired that the rule might not be drawn up; and on a ſubſequent day in the term the defendant was ſentenced to impriſonment.

Abbott, who was counſel for the proſecution, referred to *R.* v. *Sterling* and others, 1 *Lev.* 125, 6., where an objection to an information for a conſpiracy, made in arreſt of judgment for the omiſſion of the words *vi et armis*, was over-ruled.

(*a*) *Trem.* 61. (*b*) *Vid.* 2 *Show.* 468. (*c*) 5 *St. Tr.* 527. (*d*) 9 *St. Tr.* 255.

Thurſday, Nov. 10th.

Though the plaintiff diſcontinue on the common rule on payment of coſts he is not liable to an attachment for non-payment.

STOKES *againſt* WOODESON.

THE plaintiff obtained the common rule to diſcontinue "on "payment of coſts;" and now the queſtion was, whether he was liable to an attachment for non-payment of thoſe coſts, which had been taxed at 1*l.* 7*s.*

The Court thought that he was not, and diſcharged the rule for an attachment.

Park in ſupport of the rule.

Burrough againſt it.

Thurſday, Nov. 10th.

Where an action muſt be brought within three months, it is ſufficient for the plaintiff to prove a writ ſued out within ſuch time and his declaration within a year afterwards, without ſhewing ſuch writ returned.

PARSONS *againſt* KING.

THIS action, which was tried at the laſt Aſſizes at *Wells*, before *Thomſon*, B., was brought in order to review a judgment of the commiſſioners under an incloſure act; which directed that if any party was diſſatisfied with their judgment he might bring an action in the manner and form therein ſpecified within three calendar months after their determination. The determination of the commiſſioners appeared at the trial to have been made on the 19th *September* 1795, and the declaration was of *Trinity* term 1796. And therefore the commencement of the ſuit, ſo far as appeared by the *Niſi Prius* record, being beyond the time limited, the defendant called on the plaintiff to ſhew that the action had been commenced in time: whereupon the plaintiff gave in evidence the writ ſued out on the 16th *December* 1795, but did not ſhew that ſuch writ had been either ſerved or returned. On which

Bond, for the defendant, contended upon the authority of *Harris q. t.* v. *Woolford* (a) that the plaintiff muſt be nonſuited; becauſe it did not appear that there was any connexion between the writ given in evidence and the declaration; and indeed the preſumption was that the plaintiff had not declared upon that writ, the declaration not having been filed within two terms after it was ſued out. That in the caſe cited it was held neceſſary to ſhew, where an action was limited to be brought within a certain time, and the ſuit did not appear by the *Niſi Prius* record to have been commenced within that time, that the writ which was the commencement of the action was returned and the continuances regularly entered, in order that it might apppear that the ſuit had been commenced within the time limited and continued down to and connected with the *Niſi Prius* record.

(a) *Ante*, 6 vol. 617.

The learned Judge directed a verdict to be taken for the plaintiff, the merits being with him, reſerving liberty to the defendant to move to enter a nonſuit, if this Court ſhould think the objection well founded; which motion was now made accordingly by *Bond* on the ſame ground. But

Per Curiam; There is a manifeſt diſtinction between the caſe cited and the preſent. In that caſe two writs were given in evidence; and it was neceſſary in order to ſave the time to ſhew that the ſecond writ on which the plaintiff had declared was a continuation of the firſt writ, which could only be done by ſhewing that the firſt was returned, in order to warrant the iſſuing of the alias writ. But here the plaintiff gave in evidence a writ ſued out in proper time, which will warrant his declaration; and therefore there is no neceſſity to ſhew the writ returned. The miſtake proceeds upon the ſuppoſition that the plaintiff could not declare upon that writ after two terms: but although if he do not declare within that time the defendant may ſign judgment of nonpros, yet if the defendant omit ſo to do, the plaintiff may declare at any time within a year (*a*) after ſuing out his writ.

Rule refuſed.

(*a*) Vid. *Worley* v. *Lee, ante,* 2 vol. 112; *Penny* v. *Harvey, ante,* 3 vol. 123; and *Sherſon* v. *Hughes, ante,* 5 vol. 36.

Hutson *againſt* Hutson.

Friday, Nov. 11th.

When a defendant in cuſtody executes a warrant of attorney to confeſs a judgment, there muſt be an attorney preſent on his part: the preſence of the plaintiff's attorney is inſufficient, though the defendant conſent to his acting as his attorney alſo.

THIS was a rule to ſhew cauſe why the judgment and execution ſhould not be ſet aſide, on an affidavit ſtating that the warrant of attorney on which the judgment was entered up was executed by the defendant while in cuſtody at the plaintiff's ſuit, no attorney on his part being preſent at the time.

Garrow,

1796.

Hutson *againſt* Hutson.

Garrow, who now ſhewed cauſe, after producing an affidavit, by which it appeared that the plaintiff's attorney recommended the defendant to ſend for an attorney with whom he might conſult previous to the execution of the warrant of attorney, but that he declined it, ſaying it was unneceſſary as he perfectly knew the nature of the tranſaction, and was ſatisfied with the preſence of the plaintiff's attorney; relied on the caſe of *Gillman* v. *Hill* (*a*), where it was held that a defendant under ſuch circumſtances was not entitled to the benefit of the rule of the Court which requires the preſence of an attorney for the defendant; and where Lord *Mansfield* ſaid, the Court would not ſuffer a defendant to convert that which was meant for his protection into an inſtrument of fraud and deceit. And he added, that it appeared in this caſe that the defendant had adopted the plaintiff's attorney as his own.

Bayley in ſupport of the rule. There are two rules of the Court, one in *E.* 15 *Car.* 2., which merely required the preſence of an attorney at the time of the execution of the warrant of attorney; the other in *E.* 4 *Geo.* 2. which recites the former rule, and then orders that no ſuch warrant of attorney ſhall be valid, unleſs there be preſent "ſome attorney on the behalf of ſuch "perſon in cuſtody *to be expreſsly named by him and attending at his* "*requeſt.*" The object of the rules was not merely to procure the attendance of an attorney to explain the nature of the inſtrument to be executed, but alſo to adviſe the defendant confidentially and as a friend. And rules thus framed for the protection of a priſoner cannot be waved by him when in a ſituation where he is incapable of exerciſing his judgment. Beſides which it will be dangerous to admit the anſwer given in the preſent caſe, ſince as the plaintiff's attorney has an opportunity of ſwearing laſt, the ſame anſwer may be given to every application, and thus the object of the rules may be defeated in every inſtance. Nor can the caſe cited from *Cowper* be conſidered as any authority for the preſent, becauſe there the defendant himſelf admitted that he executed the bond and warrant of attorney without the preſence of any attorney on his behalf *for the expreſs purpoſe of having them ſet aſide* under the rule of the Court.

Lord Kenyon, Ch. J. I think it would have been more wiſe in deciding caſes on the rule of *Geo.* 2. to have adhered to the letter of it than to have gone into the circumſtances of each par-

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(*a*) *Cowp.* 141.

HUTSON *againſt* HUTSON.

ticular caſe, eſpecially as that rule was made to explain a former rule in the reign of *Charles* the Second; ſince an explanatory rule, like an explanatory ſtatute, ſhould never be extended by conſtruction. There is great weight in the obſervation made by the counſel in ſupport of the rule, that the defendant under the preſſure of an arreſt ought to be conſidered incapable of waving the benefit of this rule, and that at all events, and in all caſes, he ſhould be protected by the advice of an attorney expreſsly attending for him. If the only object of the rules had been to guard the defendant in thoſe caſes where fraud is actually practiſed, there would have been no occaſion for any rule at all, becauſe the Court would have ſet aſide a warrant of attorney obtained by fraud, without the aſſiſtance of thoſe rules. But thoſe rules were framed in order to exclude, if poſſible, all queſtions reſpecting fraud. Were it not for any deciſion on this ſubject, I ſhould not have had the leaſt particle of doubt but that the judgment and execution in this caſe ought to be ſet aſide. But as the plaintiff may have relied on the caſe cited from *Cowper* as a deciſion in his favor, perhaps it would be too much to make this rule abſolute; though whenever the queſtion ſhall ariſe in future, I ſhall proteſt againſt any infringement of the ſtrict rule upon any ground whatever, being ſatisfied that juſtice will be beſt attained by inviolably adhering to it.

The Court then gave the defendant an opportunity of anſwering the affidavit filed by the plaintiff; and on a ſubſequent day an affidavit made by the defendant was produced, in which he denied all the matters contained in the plaintiff's affidavit; whereupon

The rule was made abſolute.

GORDON *againſt* HARPER.

Friday, Nov. 11th.

Where goods leaſed as furniture with a houſe have been wrongfully taken in execution by the ſheriff, the landlord cannot maintain trover againſt the ſheriff pending the leaſe, becauſe to maintain ſuch an action he muſt have the right of poſſeſſion as well as the right of property at the time.

IN trover for certain goods, being houſehold furniture, a verdict was found for the plaintiff, ſubject to the opinion of this Court on the following caſe.—On 1ſt *October* 1795, and from thence until the ſeizing of the goods by the defendant, as after mentioned, Mr. *Biſcoe* was in poſſeſſion of a manſion houſe at *Shoreham* and of the goods in queſtion, being the furniture of the ſaid houſe, as tenant of the houſe and furniture to the plaintiff, under an

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against
HARPER.

agreement made between the plaintiff and Mr. *Biſcoe*, for a term which at the trial of this action was not expired. The goods in queſtion were on the 24th of *October* taken in execution by the defendant, then ſheriff of the county of *Kent*, by virtue of a writ of *teſtatum fieri facias* iſſued on a judgment at the ſuit of *J. Broomhead* and others, executors of *J. Broomhead* deceaſed, againſt one *Borrett*, to whom the goods in queſtion had belonged, but which goods, previous to the agreement between the plaintiff and Mr. *Biſcoe* had been ſold by *Borrett* to the plaintiff. The defendant after the ſeizure ſold the goods. The queſtion is, whether the plaintiff is entitled to recover in an action *of trover*.

Burrough for the plaintiff admitted that the action of trover is founded in the plaintiff's right of property in the goods to be recovered, and that though an actual poſſeſſion by him before the converſion was not neceſſary, yet that he muſt alſo have the right of poſſeſſion at the time of the action brought. But he contended that in this caſe the plaintiff had the legal poſſeſſion. The intent of the parties to the agreement was no more than that the tenant ſhould have *the uſe* of the furniture during the term; the ownerſhip and property remained in the landlord, the plaintiff. If the tenant had injured or deſtroyed it, the plaintiff might have maintained treſpaſs; according to the caſe put in *Co. Lit.* 57. *a.*, that if a man lend his ſheep to another to dung his land, and he kill them, treſpaſs lies notwithſtanding the delivery. So here as the tenant had only the uſe and not the property of the goods, as ſoon as they were put in that ſtate wherein he could no longer enjoy the uſe of them in the manner agreed upon, the full dominion of the plaintiff revived. In the ſame manner during a leaſe of lands the tenant has a right to the uſe of the trees growing thereon for every purpoſe except that of cutting them down; but as ſoon as they are cut down, although by a ſtranger, his intereſt ceaſes, and the poſſeſſion as well as property in the timber veſt in the owner of the inheritance. Even in the caſe of an execution againſt the tenant, the ſheriff could not ſeize and ſell furniture let with the premiſes, becauſe the writ of execution only authoriſes him to ſell the *goods of the tenant*; which ſhews that in law he is only conſidered as entitled to the uſe, and has not the property in them; and he cited *Plow.* 524. But the the caſe of *Ward* v. *Macauley* (*a*) is directly in point; there the

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(*a*) *Ante*, 4 vol. 489.

landlord

landlord of a ready furniſhed houſe brought treſpaſs againſt the ſheriff for ſeizing the furniture under an execution againſt the tenant: the Court held the action miſconceived; and Lord *Kenyon* ſaid, that the remedy was by an action of trover; and he took the diſtinction between treſpaſs and trover, the former of which was founded upon poſſeſſion, the latter on property. Here the right of property always remained in the plaintiff, and as ſoon as the temporary and qualified uſe which he had given to another was determined, which was the caſe when the goods could no longer be enjoyed in the ſtipulated manner, he had a right to reſume the actual poſſeſſion of them from the hands of a wrong-doer.

Beſt contrà was ſtopped by the Court.

Lord KENYON, Ch. J. The only point for the conſideration of the Court in the caſe of *Ward* v. *Macauley* was, whether in a caſe like the preſent the landlord could maintain an action of *treſpaſs* againſt the ſheriff for ſeizing goods, let with a houſe, under an execution againſt the tenant; and it was properly decided that no ſuch action could be maintained. What was ſaid further by me in that caſe, that trover was the proper remedy, was an extrajudicial opinion, to which upon further conſideration I cannot ſubſcribe. The true queſtion is, whether when a perſon has leaſed goods in a houſe to another for a certain time, whereby he parts with the right of poſſeſſion during the term to the tenant, and has only a reverſionary intereſt, he can notwithſtanding recover the value of the whole property pending the exiſtence of the term in an action of trover. The very ſtatement of the propoſition affords an anſwer to it. If, inſtead of houſehold goods, the goods here taken had been machines uſed in manufacture which had been leaſed to a tenant, no doubt could have been made but that the ſheriff might have ſeized them under an execution againſt the tenant, and the creditor would have been entitled to the beneficial uſe of the property during the term: the difference of the goods then cannot vary the law. The caſes which have been put at the bar do not apply: the one on which the greateſt ſtreſs was laid was that of a tenant for years of land whereon timber is cut down, in which caſe it was truly ſaid, that the owner of the inheritance might maintain trover for ſuch timber, notwithſtanding the leaſe. But it muſt be remembered that the only right of the tenant is to the ſhade of the tree when growing, and by the very act of felling it his right is abſolutely determined; and even then the property does not veſt in his immediate landlord; for if he has only an eſtate for life, it will go over to the owner of the inheritance. Here however the tenant's right of poſſeſſion during the term cannot be deveſted by any wrongful act, nor can it thereby be reveſted in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this caſe, not being at preſent called upon ſo to do: but it is clear that he cannot maintain trover.

ASHHURST, J. I have always underſtood the rule of law to be, that in order to maintain trover the plaintiff muſt have a right of property in the thing and a right of poſſeſſion, and that unleſs both theſe rights concur the action will not lie. Now here it is admitted that the tenant had the right of poſſeſſion during the continuance of his term, and conſequently one of the requiſites is wanting to the landlord's right of action. It is true that in the preſent caſe it is not very probable that the furniture can be of any uſe to any other than the actual tenant of the premiſes: but ſuppoſing the things leaſed had been manufacturing engines, there is no reaſon why a creditor ſeizing them under an execution ſhould not avail himſelf of the beneficial uſe of them during the term.

GROSE, J. The only queſtion is, whether trover will lie where the plaintiff had neither the actual poſſeſſion of the goods taken at the time nor the right of poſſeſſion. The common form of pleading in ſuch an action is deciſive againſt him; for he declares that *being poſſeſſed*, &c. he loſt the goods; he is therefore bound to ſhew either an actual or virtual poſſeſſion. If he had a right to the poſſeſſion, it is implied by law. Where goods are delivered to a carrier, the owner has ſtill a right of poſſeſſion as againſt a tort-feaſor, and the carrier is no more than his ſervant. But here it is clear that the plaintiff had no right of poſſeſſion; and he would be a treſpaſſer if he took the goods from the tenant; then by what authority can he recover them from any other perſon during the term? It is laid down in ſome of the books (*a*) that trover lies where detinue will lie, the former having in modern times been ſubſtituted for the old action of detinue. I will not ſay that it is univerſally true that the one action may be ſubſtituted for the other, becauſe the authorities referred to in ſupport of that propoſition do not apply to that extent: but certainly it may be ſaid to be a good general criterion. But

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(*a*) Vid. 1 *Bac. Abr.* 45. and 5 *Bac. Abr.* 257. 2 *Com. Dig.* tit. *Detinue* letter (D).

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it is clear in this caſe that detinue would not lie, becauſe the plaintiff had no right to the poſſeſſion of the ſpecific goods at the time. And if not, it is a ſtrong argument to ſhew that trover, which was ſubſtituted in lieu of it, cannot be maintained by the preſent plaintiff. Much ſtreſs has been laid on what was ſaid in *Ward* v. *Macauley*. But the only queſtion there was, whether *treſpaſs* would lie under theſe circumſtances; and it was not neceſſary to determine how far *trover* might be maintained. It appears now very clearly upon examining that point that trover will not lie in any caſe, unleſs the property converted was in the actual or implied rightful poſſeſſion of the plaintiff. In this caſe the plaintiff had neither the one nor the other pending the demiſe, and when that is determined perhaps he may have his goods reſtored to him again in the ſame ſtate in which they now are, when it will appear that he has not ſuſtained that damage which he now ſeeks to recover in this action.

Lawrence, J. The obſervation which my brother *Groſe* has made upon the form of the action of trover is very material; the plaintiff therein ſtates that he was poſſeſſed of the goods mentioned, and being ſo poſſeſſed he caſually loſt them, and that they came to the hands and poſſeſſion of the defendant by finding. And the principal difficulty in moſt of the caſes reported upon this head has been, whether the plaintiff had ſuch a poſſeſſion whereon he could declare in this action; as in *Latch.* 214. where the plaintiff, as executor, declared upon the poſſeſſion of his teſtator, and the Court held that to be ſufficient, becauſe the property was veſted in the executor; and no other perſon having a right to the poſſeſſion, the property drew after it the poſſeſſion in law. In *Berry* v. *Heard*, *Palm.* 327., and *Cro. Car.* 242., it was for a long time in great doubt, whether the landlord had ſuch a poſſeſſion of timber cut down pending a leaſe on which he could maintain trover; but it was finally determined that he had, becauſe the intereſt of the leſſee in it remained no longer than while it was growing on the premiſes, and determined inſtantly when it was cut down. Now here if the taking of the goods by the ſheriff determined the intereſt of the tenant in them, and reveſted it in the landlord, I admit that the latter might maintain trover for them upon the authority of the other caſe: but it is clearly otherwiſe; for here the tenant's property and intereſt did not determine by the

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ſheriff's treſpaſs, and the tenant might maintain treſpaſs againſt the wrong-doer, and recover damages. He is bound to reſtore the goods to the landlord at the end of his term; and could not juſtify his not doing ſo becauſe a ſtranger had committed a treſpaſs upon him in taking them away.

Poſtea to the defendant.

Tueſday, Nov. 15th.

Cooper *againſt* Elston.

A ſale of goods for more than 10*l.* by ſample in one place to be afterwards delivered at another is within the ſtatute of frauds, *ſ.* 17. if no part of the goods contracted for were delivered, nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing, &c.

THIS action, which was tried before Mr. Juſtice *Rooke* at the Aſſizes at *Nottingham*, was brought to recover the damages ſuſtained by the plaintiff, in conſequence of the defendant's not delivering 50 quarters of wheat purſuant to his contract with the plaintiff. The jury found a verdict for the plaintiff, damages 50*l.*, ſubject to the opinion of this Court on the following caſe. The defendant on the 4th of *July* 1795, at *Nottingham*, ſold to the plaintiff by ſample 50 quarters of wheat at four guineas *per* quarter; the wheat to be delivered by the defendant to the plaintiff at *Gainſborough*. Two days afterwards the defendant delivered to the plaintiff at *Nottingham* the ſample by which he had ſold the wheat to him: but ſuch ſample was no part of the 50 quarters to be delivered at *Gainſborough*. No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing ſigned by the parties. The defendant afterwards refuſed to deliver the wheat.

The queſtion turned on the 17th ſection of the ſtatute of frauds, 29 *Car.* 2. *c.* 3., which enacts "That no contract for the ſale of any goods for 10*l.* or upwards ſhall be good, except the buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the bargain or in part of payment, or that ſome note or memorandum in writing of the ſaid bargain be made and ſigned by the parties to be charged by ſuch contracts" *&c.*

Clarke for the plaintiff contended, that by the conſtruction put upon the above clauſe in *Towers* v. *Oſborn* (*a*), and in *Clayton* v. *Andrews* (*b*), it is confined to contracts for the immediate ſale and delivery of goods, and does not extend to ſuch as are executory, or to be performed at ſome future period. And therefore it was held in the latter of theſe caſes that an agree-

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(*a*) 1 *Stra.* 506. (*b*) 4 *Burr.* 2101.

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ment to deliver ſo much wheat, then unthreſhed, within a month, to be paid for on delivery at a ſtipulated price, was not within the act. The ſtatute was meant to guard againſt frauds and perjuries, by ſetting up pretended contracts of ſale, where no evidence of notoriety exiſted, and the circumſtances of the caſe juſtified a ſuſpicion of the truth of it. As where the thing ſuppoſed to be ſold was ready for delivery at the time, and there was no apparent reaſon why the buyer ſhould not then have taken it, the very circumſtance of his not taking it, or any part of it, or not giving any thing in earneſt to bind the bargain, or having ſome memorandum of it in writing, afforded a preſumption againſt the exiſtence of the contract. But upon this ground executory contracts could not have been within the contemplation of the Legiſlature; becauſe the non-execution of that which the parties did not intend to execute, and could not have executed at the time, cannot warrant ſuch a preſumption. It is true that a contrary rule was laid down in a late caſe of *Rondeau* v. *Wyatt* (*a*), in the court of *C. B.*, where three of the Judges againſt one, under ſomewhat ſimilar circumſtances to the preſent, held that there was no difference between contracts executory and executed as to the operation of the ſtatute. But beſides that that determination was upon the general principle contrary to the current of authorities, there were two circumſtances which diſtinguiſh it from the preſent caſe; the one, that the contract there was founded in apparent fraud, and an illegal combination between the parties to affect the price of the corn market, in order to evade the law; the other, that there was no juſt reaſon why the delivery might not have taken place at the time of the contract. But here the corn being ſold by ſample, the delivery could not have taken place at the time, and therefore it does not come within the reaſon of the ſtatute, the requiſites of which could not in this view of the caſe have been all complied with. But ſuppoſing the contract not to be conſidered as executory or to be performed in future, and the ſale by ſample to be the ſame as an immediate ſale of the goods themſelves if they had been on the ſpot, then as the buyer was neceſſarily entitled to the ſample, it may be conſidered as an acceptance by him of part of the goods ſold; and this brings the caſe within one of the exceptions of the act.

Sutton contrà was ſtopped by the Court.

(*a*) 2 *H. Black. Rep.* 63.

Lord KENYON, Ch. J. After this queſtion has been afloat ſo long in the courts, I am glad that by the very able deciſion of the Court of Common Pleas, in the caſe of *Rondeau* v. *Wyatt*, the conſtruction of this clauſe of the ſtatute of frauds is brought back to the manifeſt intention of the Legiſlature in making that proviſion. To the authority of that caſe I entirely ſubſcribe, and in my opinion it governs the preſent. The doctrine which was laid down in *Clayton* v. *Andrews*, as to executory contracts not being within the ſtatute, was taken from *Towers* v. *Oſborn*. I will not pretend to ſay that thoſe caſes were not rightly decided upon their particular circumſtances. The latter was a mere contract for work and labour; the thing contracted for did not exiſt at the time. In the former alſo ſomething was required to be done in order to put it in the ſtate in which it was contracted to be ſold. But at any rate I am at a loſs to diſcover how this can be called an executory contract for the ſale of the goods in queſtion. The thing ſold exiſted *in ſolido* at the time of the contract of ſale. I am not able to diſtinguiſh this caſe from that of *Rondeau* v. *Wyatt*; and the grounds and principles of that deciſion are ſo amply detailed in the report of it, that it is unneceſſary to add any thing more. With reſpect to this coming within one of the exceptions of the ſtatute on account of the acceptance of the ſample; there is no pretence for it, for the caſe expreſsly ſtates that the ſample was no part of the goods contracted to be delivered.

ASHHURST, J. was of the ſame opinion.

GROSE, J. The caſe of *Towers* v. *Oſborn* went upon the general principle that executory contracts were not within the meaning of the ſtatute. If by that were meant contracts for the ſale of goods to be executed on a future day, ſuch a conſtruction would be a repeal of the act: but if it only meant ſuch contracts as were incapable of being executed at the time, then the deciſion was right; and ſuch was the caſe then in judgment. But in this ſenſe the contract here cannot be ſaid to be executory, for the thing exiſted and was capable of being delivered. It is much to be lamented that the excellent proviſions of the ſtatute of frauds ſhould ever have been infringed or weakened by conſtruction: but if in this inſtance it has been ſo, I am glad that the deciſion in the caſe of *Rondeau* v. *Wyatt* has brought us back to the letter and true ſpirit of that law.

LAWRENCE, J. The caſe of *Towers* v. *Oſborne*, when truly conſidered, was not a contract for the purchaſe of goods, but for the making of ſomething which had no exiſtence at the time. The caſe of *Clayton* v. *Andrews* went indeed ſomewhat farther; but ſtill there was to be ſome alteration in the ſtate of the commodity before it was to be delivered. The caſes which have been determined in the court of Chancery in aid of contracts of this kind were all founded upon the deciſions which had been made at law, and conſidered as neceſſarily conſequent upon them. But it is not difficult to collect what opinion was entertained of theſe deciſions by Lord Ch. *Thurlow*, when the caſe of *Rondeau* v. *Wyat* came before him in the court of Chancery (*a*) upon a bill filed to diſcover the facts and names of the parties in the undertaking, in order to found the action at law: he thought that the mere fact of the corn not being to be delivered immediately would not have taken the caſe out of the ſtatute, if the point had been new, but he thought himſelf bound by the caſes at law *till they were reviſed by a court of law*.

Poſtea to the defendant.

(*a*) 3 *Bro. Ch. Caſ.* 154.

DAVIS *againſt* LEWIS.

Tueſday, Nov. 15th.

It is no juſtification to an action of ſlander to plead that ſuch an one told the ſlander to the defendant. But if the perſon repeating the ſlander at the ſame time mention the name of the perſon from whom he heard it, that may be pleaded in juſtification to an action brought againſt the former.

IN this action for ſlander, the firſt count of the declaration ſtated that the defendant, ſpeaking of and concerning the plaintiff in his buſineſs as a taylor, ſaid to him "I heard you were run away," meaning that the plaintiff had left his uſual place of habitation with an intent to defraud his creditors. The words in the ſecond count were, "A perſon has been here to tell me that you were run away."

The defendant pleaded, in juſtification, that before the ſpeaking of the words he, the defendant, had heard and been told by one *D. Morris* that the plaintiff was run away, for which reaſon he ſpoke them.

To this there was a general demurrer.

Forreſt in ſupport of the demurrer. The giſt of an action of ſlander is malice, and here the allegation of the malice of the defendant ſtands uncontradicted on the record. "If one hear falſe rumours, &c., it is not lawful to relate to others that he hath heard *J. S.* ſay ſuch words." The Earl of *Northampton*'s caſe, 12 *Rep.* 133, 4. Again,

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Davis *againſt* Lewis.

Again, "If *J. S.* publiſh that he hath heard generally, without a certain author, that *J. G.* was a traitor or thief, an action on the caſe lies againſt *J. S.* for this, that he hath not given to the party grieved any cauſe of action againſt any but againſt himſelf who publiſhed the words, though in truth he might hear them; otherwiſe this might tend to a great ſlander of an innocent man." *Ib.* The ſame doctrine is eſtabliſhed in 3 *Bulſtr.* 225; *Meggs* v. *Griffith*, *Cro. Eliz.* 400. In *Gardiner* v. *Atwater* (*a*) it was held that an action lay for ſaying "Thou art a ſheep-ſtealing rogue, and farmer *Parker* told me ſo." Much leſs excuſable then is the defendant in the preſent caſe, who did not give up his author until after the action was brought.

Giles contrà. The giſt of the action for ſlander is not the malice but the falſehood of the words ſpoken, in which reſpect it differs from a criminal proſecution for ſlander, where the falſehood of the words is immaterial. But in an action it is neceſſary to allege the falſehood of the words, and that allegation is traverſable. Here the defendant is charged with having ſaid "I heard you were run away," to which the defendant anſwered "I heard *D. Morris* ſay that you were run away," thereby aſſerting the truth of what he had ſaid. The diſtinction taken in 12 *Rep.* 134, is between thoſe caſes where the perſon ſpeaking the words ſaid generally he had heard them, without naming the author, and thoſe caſes where he does name him. In *Crawford* v. *Middleton* (*b*), where the defendant ſaid of the plaintiff, that "he met one upon the road who ſaid" &c.; three Judges held, againſt the opinion of *Twiſden*, J., that the declaration was ill for want of an averment that in truth no body ſaid ſo to the plaintiff, for that had been traverſable; "*and the defendant might have pleaded thereto that another told him ſo.*" And if the defendant be juſtified in repeating what he has heard provided he gives up the author of the words, it is ſufficient that he give up the author at the time of the plea, for the juſtification is equally true. Beſides if this were not a juſtification, the allegation of falſehood would be immaterial where the author was not named at the time of ſpeaking the words, and need not be inſerted in the declaration; for whether true or falſe, there could be no juſtification. The caſe cited from *Sayer* is clearly diſtinguiſhable from the preſent, for there the defendant ſaid of the plaintiff ſo and ſo, *and* farmer *Parker* told me ſo; which was adding an aſſertion of his own.

(*a*) *Say.* 265. (*b*) 1 *Lev.* 82.

DAVIS *againſt* LEWIS.

Lord KENYON, Ch. J. Whether this be conſidered on the authorities or on the reaſon of the caſe, the juſtification cannot be ſupported. The Earl of *Northampton*'s caſe is preciſely in point. If a perſon ſay that ſuch a particular man (naming him) told him certain ſlander, and that man did in fact tell him ſo, it is a good defence to an action to be brought by the perſon of whom the ſlander was ſpoken: but if he aſſert the ſlander generally, without adding who told it to him, it is actionable. Then it is ſaid, that it is ſufficient to repel ſuch action to diſcloſe by the defendant's plea the perſon who told him the ſlander: but that is clearly no juſtification, after putting the plaintiff to the expence of bringing the action. The plaintiff can only impute the ſlander to the man who utters it, if the latter do not mention the perſon from whom he heard it. The juſtice of the caſe alſo falls in with the deciſions on this ſubject. It is juſt that, when a perſon repeats any ſlander againſt another, he ſhould at the ſame time declare from whom he heard it, in order that the party injured may ſue the author of the ſlander. I am therefore clearly of opinion both on authority and the reaſon of the caſe that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

CROMPTON *againſt* STEWARD.

Tueſday, Nov. 15th.

The rule of Court, requiring the preſence of an attorney for a defendant in cuſtody when he ſigns a warrant of attorney to confeſs judgment, does not extend to caſes where the defendant is *in execution*.

MARRYAT obtained a rule, calling on the plaintiff to ſhew cauſe why the judgment and execution ſhould not be ſet aſide, becauſe the judgment was ſigned on a warrant of attorney executed by the defendant when in cuſtody, no attorney on his behalf being preſent. The facts were theſe; the defendant, being in execution in an action brought againſt him by the Chamberlain of the City of *London*, executed a warrant of attorney to confeſs judgment in this action, no attorney being preſent for him, (but only *Jones* a clerk to the attorney for the plaintiff in the former cauſe, as the defendant ſtated it:) but it was ſtated by the plaintiff, in anſwer, that *Jones*, though he was clerk to the attorney in the former action, was an attorney for himſelf and acted as ſuch in this cauſe.

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CROMPTON *againſt* STEWARD.

Garrow, in ſhewing cauſe, relied on the caſe of *Birch* v. *Sharland* (*a*), as an authority to ſhew that the rule of the Court, 4 *Geo*. 2., did not apply to this caſe, becauſe the defendant was *in execution*; and 2dly. If it did, he contended that the rule was ſatisfied by the preſence of *Jones*, who as an attorney himſelf was amenable to the Court for any mal-practices, if any could be imputed to him (*b*).

Lord KENYON, Ch. J. The caſe cited ſhews that the rule of *Geo*. 2., does not apply to this caſe, the defendant being in execution at the time when the warrant of attorney was executed. But even if this were a caſe within that rule, the other anſwer would be ſufficient to diſcharge the preſent application; for in whatever character *Jones* may have acted on former occaſions, as he is an attorney himſelf and acted as the defendant's attorney in this caſe, that is all that is required.

LAWRENCE, J. The reaſon of making the rules of *Car*. 2. and *Geo*. 2. was to protect a perſon arreſted and in cuſtody on *meſne proceſs* from the conſequences of an act by which in conſideration of being releaſed from immediate impriſonment he might ſubject himſelf to the payment of a larger ſum than is really due from him. But when he is charged in execution, that miſchief is not to be apprehended; and therefore the rules do not apply to ſuch a caſe.

Rule diſcharged.

(*a*) *Ante*, 1 vol. 715. Which was determined on the authority of *Fell* v. *Riley*, *Cowp*. 281. See alſo *Watkins* v. *Hanbury*, 2 *Stra*. 1245.

(*b*) Vid. *Barnes* v. *Ward*, Sir *G. Co. Prac*. 158. where it was held that the preſence of a clerk to an attorney was not ſufficient, but that he ſhould be a *ſworn attorney*.

Tueſday, Nov. 15th.

BRAGNER *againſt* JOSEPH LANGMEAD.

A judgment ſigned in any part of the term or the ſubſequent vacation relates back to the firſt day of the term, notwithſtanding the death of the defendant before judgment actually ſigned; and an execution againſt the goods of the defendant may be taken out upon it, teſted the firſt day of the term.

A RULE, on behalf of the ſuppoſed adminiſtratrix of the defendant, was obtained, calling on the plaintiff to ſhew cauſe why the final judgment and execution in this cauſe ſhould not be ſet aſide, on theſe facts; on the 27th of *May* a rule for judgment was given, which expired on the 1ſt of *June*; the defendant died on the 29th of *May*; final judgment was ſigned on the 2d of *June*; and execution iſſued againſt the goods of

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Bragner *againſt* Langmead.

of the defendant on the 10th of *June* in the ſame term, but teſted on the 27th of *May*, which was the firſt day of *Trinity* term, and the day to which the judgment had relation back; and the execution was levied on the 11th of *June*.

Gibbs, *Ruſſel*, and *Wigley*, now ſhewed cauſe againſt that rule. 1ſt. The judgment is clearly regular; becauſe it has been held in a variety of caſes that a judgment ſigned during any part of the term or even in the following vacation relates to and is conſidered as a judgment of the firſt day of the term. [The defendant's counſel then admitted the regularity of the judgment.] 2dly. Nor is there any reaſon to queſtion the legality of the execution, becauſe that alſo relates to the judgment which takes effect from a day prior to the defendant's death. In *Odes* v. *Woodward* (*a*), on an objection to a judgment actually ſigned after the death of the party, though teſted of the term before he died, Lord *Holt* put this very caſe; "If *A.* recover judgment againſt *B.*, *B.* dies in the vacation within the year; at the end of it *A.* may ſue out a *fieri facias* as of the precedent term, and levy the goods of *B.* in the hands of his executors." The ſame caſe is alſo reported in 7 *Mod.* 2. 93. Again, in *Robinſon* v. *Tonge* (*b*) Lord Chancellor *Talbot* ſaid "With regard to judgments on warrants of attorney entered after the inteſtate's death, as theſe related to the firſt day of the term, when the inteſtate was alive, the ſame were good judgments from that time; for the ſtatute of frauds which enacts that no judgment ſhall bind land but from the ſigning concerns only purchaſers and not creditors; ſo that as to creditors this remains as it was at common law." A caſe is added as a note there, *Finch* v. The Earl of *Winchelſea*, where the ſame rule was applied to *executions* taken out after the death of the defendant, becauſe being ſued out before the eſſoign day of the next term they related to the preceding term when the defendant was alive. And the ſame doctrine, as to executions, was adopted in *Springer* v. *Somerville*, *Bunb.* 271. in Dr. *Needham*'s caſe, and in *Parſons* v. The Executors of *Gill*, *ib.* in not; in *Com. Rep.* 117; in 1 Ld. *Raym.* 695 (*c*); and in *Houghton* v. *Ruſhby*, *Skin.* 257. At common law goods

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(*a*) 2 Ld. *Raym.* 766. 850.

(*b*) 3 *P. Wms.* 399.

(*c*) The caſe of *Parſons* v. *Gill* is differently reported in Lord *Raym*; *Com.*; and *Bunb.*: but the following M.S. note of that caſe appears more accurate than either of thoſe reports; Sir *John Parſons* v. *Gill.*—"*Gill* acknowledged a judgment in debt to Sir *John Parſons* in *Hilary* vacation, and the judgment was entered the 2d of *April*. *Gill* died the 9th of *April*. Sir *John Parſons* took out a *fieri facias* teſted the 23d of *January*, goods were bound from the teſtè of the writ; and the ſtatute of frauds which ſaid that they ſhould only be bound from the delivery of the writ to the ſheriff only relates to purchaſers and not to the defendant himſelf. This caſe is diſtinguiſhable from that of *Heapy* v. *Parris* (*a*); for there the writ of execution was teſtèd after the defendant's death.

Garrow and *Holroyd* in ſupport of the rule. The Court are now called upon by the plaintiff to give effect to a fiction of law, againſt the real juſtice of the caſe, and to the prejudice of the other creditors of the defendant. But they will not lend him their aſſiſtance and ſupport the preſent execution, unleſs they are bound by a current of authorities, all uniformly decided the ſame way. Now on examining the caſes on this ſubject it will be found that none of them except the caſes in *Bunbury*, *Skinner*, and *Comyns*, warrant this execution; and they are oppoſed by two ſubſequent deciſions, and by the words and meaning of the ſtatute of frauds. The caſes in 2 Ld. *Raym.* 766, and 3 *P. Wms.* 399, were reſpecting the validity of the *judgment.* The caſe of *Finch* v. The Earl of *Winchelſea* was in Equity; the party objecting to the execution ſhould have applied to this Court to ſet it aſide; for as long as it remained in force the Lord Chancellor found himſelf obliged to give effect to it. Now in oppoſition to the caſes in *Bunb.*, *Skin.* and *Com.* are thoſe of *Heapy* v. *Parris* (*a*), and *Walker* v. *Drawater* (*b*), in both of which the execution was ſet aſide; and in the latter it appeared that the writ was teſtèd before, though not actually ſued out

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January, upon which he took the goods of *Gill*, being in the hands of his executors. And motion was to ſuperſede and ſet aſide this *execution*, as having been made irregularly; firſt, becauſe the *fieri facias* bore teſtè before the time the judgment was entered; ſecondly, becauſe it ought not to have been executed upon the executors of *Gill*, for that it imported only a command to take in execution the goods of *Gill*; and whatever was his in his lifetime upon his death ceaſed to be ſo and became his executor's, againſt whom the authority given by that writ did not extend. To this it was anſwered, *per curiam*, that the *fieri facias* was regularly taken out and well executed. To the firſt objection; the judgment, being entered in the vacation, was a judgment of the preceding term; and the writ bearing teſtè the firſt day of that term was ſufficiently ſupported by it; though they agreed that if the writ had been actually taken out before the judgment had been entered, that had been irregular, and could not have been ſupported by the relation of the judgment entered afterwards. To the ſecond objection; that the writ being teſtèd in the life of *Gill* might well enough be executed upon the goods that were his in the hands of his executors, becauſe by the teſtè of the writ the property of the goods is bound againſt all but purchaſers; and this was ſo adjudged not long ſince in this Court, in Dr. *Needham*'s caſe, *P.* 3 *W.* & *M.*"

(*a*) *Ante*, 6 vol. 368.

(*b*) In the *Exchequer*, *Hil.* 1796. There the party died on the 27th of *February*, the *fieri facias* was ſued out and delivered to the ſheriff on the 3d of *March*, but it was teſtèd on the 12th of *February* preceding.

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until after, the death of the party. And theſe two caſes are warranted both by the reaſon and letter of the ſtatute of frauds (*a*), from not accurately attending to which the confuſion in the caſes has ariſen. The intention of the Legiſlature in making that ſtatute evidently was, that the goods of a defendant ſhould not in any caſe be affected by a *fieri facias* until it was delivered to the ſheriff. And a manifeſt diſtinction is made in the ſtatute between judgments affecting lands, and executions againſt goods, the former only binding the lands "as *againſt purchaſers bonâ fide* for a valuable conſideration," *ſect.* 13, 15; the latter binding the property of the goods only from the time when the writ is delivered to the ſheriff, *ſect.* 16; not adding, as in the preceding clauſe, "as againſt purchaſers," but generally as againſt all perſons (*b*) whomſoever. The caſes therefore in which it has been held that that ſtatute only meant to protect the goods until the delivery of the writ to the ſheriff *in favour of purchaſers* ſeem to have proceeded on a ſuppoſition that there was no diſtinction in the ſtatute between judgments againſt lands and executions againſt goods. But a conſtruction, that that act does not protect the party himſelf as well as purchaſers before the delivery of the writ to the ſheriff, will be attended with great hardſhip and injuſtice both to the creditors and executor of the debtor; to the former, becauſe by a mere fiction of law one creditor will obtain an undue preference; to the latter, becauſe not knowing of the judgments obtained againſt the debtor (unleſs they be docketted) he may have paid debts of an inferior nature, and thus be liable as for a *devaſtavit*. Nor can the preſent rule be diſcharged without infringing another ſtatute, 4 & 5 *W.* & *M.* *c.* 20. *ſ.* 3., which enacts that no judgment, not docketted, ſhall affect any lands &*c.*, or have any preference againſt heirs executors or adminiſtrators; for this will be giving a preference to a judgment not docketted.

Lord KENYON, Ch. J. If we were now to conſider for the firſt time, whether legal relations and legal fictions ſhould be adopted, we would enquire into and ſift moſt minutely the foundations on which they could be ſupported: but it is now

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(*a*) 29 *Car.* 2. *c.* 3.

(*b*) In *Skin.* 257. *Treby*, Ch. J. (then at the bar) ſaid, "It was ſaid in parliament when this act was made, that the miſchief was great that in long vacations when goods have been ſold in a market overt, or taken upon a diſtreſs, &c., a *fieri fncias* teſted the laſt term ſhould come and over-reach them, and for this miſchief they intended to provide a remedy, *and not for the party himſelf.*"

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too late for us ſitting in a court of law, at the cloſe of the 18th century, to conſider whether or not that which has at all times been conſidered as law ſhould continue to be law now. In this caſe we are bound by a current of authorities, all ſpeaking the ſame language. This queſtion indeed, reſpecting the execution, did not expreſsly come in judgment in all the caſes, but the point inſiſted on by the plaintiff here was conſidered as acknowleged law by all the Judges in thoſe caſes. In every caſe that has happened, it has been held that the execution may relate back to the firſt day of the term, though the defendant died before execution actually taken out, unleſs ſomething be done in the interim to ſhew an incongruity in the proceedings, as was done in the caſe of *Heapy* v. *Parris*. If that caſe had been contradictory to the preſent, though I ſhould have found myſelf preſſed by it as being a deciſion of our own, I would have corrected my error now: but on examining it, I am extremely glad to find that, ſo far from it's having been decided in oppoſition to any of the former caſes, it agrees with them all. There the plaintiff did not ſue out execution teſtèd on a day prior to the death of the defendant as he might perhaps have done, ſo that it might have legal relation back, but the execution ſued out after the death bore teſtè on a day poſterior to the defendant's death; and conſequently that execution was irregular. What was ſaid in that caſe was applicable only to a caſe ſo circumſtanced: but this is an execution againſt the goods of the defendant teſtèd in the defendant's lifetime. With regard to the late caſe in the Exchequer, the facts of it are not ſufficiently before us to enable us to ſee how far it bears upon the preſent caſe.

The Court were about to diſcharge the rule: but the defendant's counſel deſiring that the rule might not be finally diſpoſed of before an accurate account of the caſe in the Exchequer was procured, the caſe ſtood over for this purpoſe. But on a ſubſequent day the plaintiff's counſel produced an affidavit ſhewing that the perſon making this application had no authority to do ſo, not having obtained letters of adminiſtration; *and on that ground the rule was diſcharged.*

Lord Kenyon, Ch. J. added that ſince the caſe had been argued he had again looked through all the caſes cited, and alſo that of *Chancey* v. *Needham*, reported in 2 *Str.* 1081, but of which his lordſhip ſaid he had a better manuſcript note, and that they all confirmed his former opinion.

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Wedneſday, Nov. 16th.

BROOKE and others *againſt* BRYANT.

An attorney not having practiſed for ſome time previous to the iſſuing of the plaintiff's writ againſt him is not privileged from being arreſted thereon and held to bail, on the ground of having recommenced his practice, and taken out his certificate before he was actually arreſted.

A RULE was obtained calling on the plaintiffs to ſhew cauſe why all the proceedings ſhould not be ſet aſide, and why the bail-bond executed by the defendant on his arreſt to the ſheriff of *Surry* ſhould not be delivered up to be cancelled, on the ground that he was a practiſing attorney of this court, and as ſuch privileged from arreſt. It appeared upon the affidavits that the defendant, though he had been admitted an attorney many years ago, had not practiſed as ſuch from *December* 1793 to the 2d *Auguſt* 1796, nor had taken out during that time any certificate, as required by the 25 *Geo.* 3. *c.* 80.: but on the laſt mentioned day he had taken out ſuch a certificate, and ſince that time had in ſeveral inſtances acted as an attorney. The writ upon which he was arreſted and held to bail iſſued on the 14th *June* 1796, but owing to his having kept out of the way he could not be taken until the 31ſt of *Auguſt*. The queſtion was, whether the privilege of an attorney was confined to the time of iſſuing the proceſs, or might commence ſubſequently and protect him at the time of the arreſt.

Garrow and *Ruſſell* oppoſed the rule.

Erſkine in ſupport of it.

Lord KENYON, Ch. J. I do not find, upon referring to the Maſter, that this preciſe caſe has occurred before; but the reaſon juſtice and convenience of the thing require that the privilege ſhould be confined to the time of ſuing out the writ. We muſt look to the act of the plaintiff in the firſt inſtance; and if his proceding be regular then, no voluntary act of the defendant afterwards can vacate it. The greateſt injuſtice would enſue if it were otherwiſe. For inſtance, ſuppoſe the ſtatute of limitations had nearly run upon a debt, and a writ were ſued out to ſave the lapſe againſt a perſon not then entitled to the privilege of an attorney, but before the writ could be executed he inveſted himſelf with that character and obtained his certificate to practiſe: if his privilege could intervene to protect him from the ordinary proceſs, the conſequence would be that the whole proceeding muſt be ſet aſide for irregularity, and the plaintiff's remedy would be barred.

LAWRENCE, J. The privilege of an attorney does not neceſſarily attach upon a perſon's inveſting himſelf with that character,

but

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Brooke and others *againſt* Bryant.

but he muſt be a practiſing attorney. The rule of Court in 1654 confines the privilege to attornies who have practiſed within a-year. In order to preſerve the privilege therefore the party muſt continue to act as ſuch; for the very foundation of it is a preſumption that an attorney is already in court attending his duty, and therefore the iſſuing of proceſs merely to bring him there is nugatory. That reaſon conſequently does not apply to an attorney who is not practiſing at the time.

Rule diſcharged.

S. P.

There was another cauſe brought by *Fairman* againſt the ſame defendant under ſimilar circumſtances, except that in that the *teſtatum capias* into *Surry* was teſtèd on the 27th *Auguſt*, (which was after the defendant had obtained his certificate,) on a writ teſtèd on the 2d of *June*. But *The Court* thought that circumſtance did not vary the caſe in favour of the defendant; becauſe the original writ muſt be conſidered as the commencement of the ſuit, of which the *teſt. cap.* was merely a continuance.

Wedneſday, Nov. 16th.

Oldham and another *againſt* Burrell.

It is irregular to file a declaration in the office when the defendant's place of reſidence is known to the plaintiff.—It is no exception againſt bail, until the plaintiff give notice of the exception.—The ſtatute 13 *Car.* 2. *ſt.* 2. *c.* 2., enabling a defendant to ſign judgment of *non pros* for want of a declaration in due time, extends to all caſes.

THE writ in this caſe was returnable the firſt return of laſt *Eaſter* Term, *April* 13th; on the ſame day a declaration was filed in the office conditionally, on a ſuppoſition that the plaintiffs did not know the defendant's place of reſidence; on the 18th of *April* bail were put in; on the 9th of *May* the bail were excepted againſt, and on the 11th *May* the plaintiffs gave notice of that exception; and no declaration having been delivered in *Trinity* term judgment of *non pros* was ſigned on the 29th of *June*; to ſet aſide which judgment and the ſubſequent proceedings a rule niſi had been obtained on two grounds; 1ſt, Becauſe the judgment was ſigned for want of a declaration, whereas a declaration had been actually filed; 2dly, Becauſe the defendant could not ſign judgment, he not having appeared; for that his perfecting bail was irregular after they had been excepted againſt, that exception having been on the 9th of *May*, within twenty days after notice of bail, (the 8th of *May* being *Sunday*.)

Baily now ſhewed cauſe againſt that rule. In anſwer to the firſt ground, he produced an affidavit by which it appeared that the plaintiffs knew the defendant's place of reſidence when the

declaration

Oldham *againſt* Burrell.

declaration was filed, and that the defendant did not know when he ſigned judgment that any declaration had been filed. And, in anſwer to the ſecond ground, he contended that the defendant had regularly perfected bail; for though bail were excepted to on the 9th of *May*, there was no notice of that exception until the 11th, and that excepting to bail without notice is not conſidered as any exception at all.

Beſt in ſupport of the rule. This queſtion ariſes on the ſtatute 13 *Car.* 2. *ſt.* 2. *c.* 2., which enables the defendant in certain caſes to ſign judgment of *non pros* for want of a declaration within two terms: but that ſtatute is not applicable to the preſent caſe, it being confined to thoſe caſes where there is ſome defect in the writ, as appears by the recital; but here the writ is not defective. Beſides which no defendant can ſign judgment of *non pros* before appearance; and here it cannot be ſaid that the defendant had regularly appeared by putting in bail; ſince the bail were excepted againſt (though no notice indeed was given of that exception) within the twenty days. But

The Court ſaid that the judgment was regularly ſigned. That the plaintiffs, knowing the defendant's place of reſidence, ought not to have filed the declaration in the office. That the defendant had appeared by putting in and juſtifying bail. That, if the plaintiffs had intended to rely on the exception to the bail, they ſhould have given notice of that exception within the time preſcribed. And that the clauſe in the act of parliament on which this judgment was ſigned was not confined to caſes where the writ is defective, but had always been conſtrued to extend to caſes in general.

Rule diſcharged.

Gill *againſt* Scrivens.

Friday, Nov. 18th.

Where an exception is in the enacting clauſe giving a right or a forfeiture, the party ſuing for the right or forfeiture muſt negative the exception in his declaration &c.—Therefore in a *ſcire facias* on a judgment againſt a perſon, who has been twice a bankrupt, under the ſtatute 5 *Geo.* 2. *c.* 30. *ſ.* 9. which ſays "the future eſtate and effects of ſuch perſon ſhall be liable to his creditors, *unleſs* the eſtate ſhall produce ſufficient to pay 15 *s.* in the pound &c," it is neceſſary for the plaintiff to aver that the bankrupt's eſtate has not paid 15 *s.* in the pound.

THE plaintiff ſued out a *ſcire facias* on a judgment againſt the defendant for 1100 *l.* in debt, and 10 *l.* 10 *s.* for damages &c. It ſtated that on the 16th of *December* 1782 the defendant became a bankrupt, that he afterwards obtained his certificate; that on the 20th of *April* 1791 he again became a bankrupt &c,

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GILL *againſt* SCRIVENS.

after which the plaintiff obtained the judgment in queſtion againſt him on a debt which became due after the above certificate, and charged him in execution; that on the 5th of *June* 1792 the defendant obtained his certificate under the ſecond commiſſion, and was on the 10th of *June* 1792 diſcharged out of cuſtody on ſuch execution by virtue of the ſtatute 5 *Geo.* 2. *c.* 30. "The eſtate of the ſaid defendant *not having at any time* produced clear, after all charges, ſufficient to pay every creditor under the ſaid laſt commiſſion 15*s.* in the pound for their reſpective debts." And then, after ſtating that the defendant was poſſeſſed of divers goods whereby the plaintiff might be ſatisfied his debt and damages, it commanded the ſheriff to make known to the defendant that he ſhould ſhew why the plaintiff ought not to have his execution againſt the goods and chattels of the defendant which had become his goods and chattels ſince the time of his obtaining his certificate under the laſt commiſſion (the tools of trade, the neceſſary houſehold goods and furniture, and neceſſary wearing apparel of the defendant his wife and children only excepted) for the debt and damages aforeſaid. To this the ſheriff of *Middleſex* returned *nihil;* on which this writ iſſued, directed to the ſheriffs of *London*, ſuggeſting that the defendant had goods *&c.* in the bailiwick of the ſheriff of *London;* and both parties appearing at the return, the plaintiff prayed execution againſt the goods and chattels *&c*, except *&c.*

The defendant pleaded that at the time of iſſuing the firſt writ of *ſcire facias* he had not any goods and chattels *in the bailiwick of the ſheriff of Middleſex*, which had become his goods ſince the time of his obtaining his certificate under the ſecond commiſſion, whereby the plaintiff might be ſatisfied his debt and damages (the tools of trade *&c.* excepted).

To this plea there was a general demurrer.

Lawes for the defendant (*a*). 1ſt. The plea, to which the plaintiff has demurred, may be ſupported on principle; 2dly. But whether the plea be or be not good, the *ſcire facias* itſelf is bad.

Firſt; Every proceſs of execution muſt follow the judgment, and ſo muſt every proceſs to revive a judgment, unleſs in certain excepted caſes. And as thoſe caſes are only exceptions from the general rule in reſpect of particular extrinſic circumſtances,

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(*a*) On a former day in this term.

thoſe circumſtances muſt be ſet forth in the proceſs; and if it be neceſſary to ſtate them, they are material and conſequently traverſable. Now here the foundation of the *ſcire facias* are the circumſtances of the different bankruptcies, the inſufficiency of the fund under the ſecond commiſſion, and the acquired property by the bankrupt after the ſecond bankruptcy; thoſe circumſtances therefore ſhould be ſtated. It is as neceſſary to ſtate the exiſtence of ſuch property in this caſe as of aſſets in the caſe of a *ſcire facias* to revive a judgment of aſſets againſt an executor *quando acciderint;* and in the latter that allegation is traverſable. *Noell* v. *Nelſon*, 2 *Saund.* 217; *Wentw. Off. Exec.* 190. *c.* 15. *Lill. Entr.* 667. and 8 *Co.* 134. Here it appears that the only property of which the plaintiff prays execution is in the county of *Middleſex*, and therefore that allegation is traverſable.

[The anſwer at firſt given to this argument in ſupport of the plea was, that it was perfectly immaterial where the goods were; that it need not have been ſtated in the *ſcire facias*, and was not traverſable any more than the *venue* in a tranſitory action. But it was afterwards diſcovered that this argument was founded on a miſapplication of the words "*your* bailiwick" in the writ; in ſuppoſing that they referred to the bailiwick of the ſheriff of *Middleſex*, whereas they related to the *bailiwick of the ſheriff of London;* ſo that the ground of the argument failed.]

2dly. There are two objections to the *ſcire facias*. 1ſt. Every *ſcire facias* ſhould be co-extenſive with the plaintiff's right under the former judgment, and particularly where that right is given by an act of parliament. Now the plaintiff's right under the ſtatute 5 *Geo.* 2. *c.* 30. *ſ.* 9. is againſt the *realty* as well as the perſonalty of the bankrupt; the words of the act being "*eſtate* and effects:" whereas this *ſcire facias* only prays execution againſt the defendant's goods and chattels. It is no anſwer to ſay that the defendant cannot object, becauſe the plaintiff prays for a leſs execution than he is entitled to; for another *ſcire facias* may be hereafter iſſued againſt the defendant's real eſtate, and thus he will be haraſſed with two ſuits inſtead of one. 2dly. The plaintiff's right is founded on a ſuppoſition that the defendant's eſtate has not paid 15*s.* in the pound; the *ſcire facias* therefore ſhould have negatived that payment. The averment of the non-payment of 15*s.* is referable only to the time of the defendant's being diſcharged out of cuſtody, and not to the time of iſſuing the writ. The writ, after ſtating that the defendant was on the 10th of

1796.

Gill *againſt* Scrivens.

June 1792 diſcharged, immediately adds, "his eſtate not having "*at any time* produced," &c. that is, at any time before the diſcharge: but conſiſtently with this allegation his eſtate may have paid 15*s.* in the pound after his diſcharge and before the iſſuing of this writ, (on the 12th of *February* 1796,) in which caſe the plaintiff was not entitled to ſue out the writ at all.

The caſe ſtood over until this day, that the plaintiff's counſel might conſider of the objections to the writ; accordingly

Chambre now argued in ſupport of the *ſcire facias*. 1ſt. Though any real as well as perſonal eſtate which the bankrupt may acquire after his ſecond bankruptcy be made liable, it is not neceſſary for the plaintiff to pray execution of that which does not exiſt. It does not appear in this caſe that the bankrupt had acquired any real eſtate ſince the bankruptcy, and therefore the plaintiff does not pray execution againſt his realty: but the writ ſuggeſts that the defendant has ſince acquired perſonal property, and the plaintiff has a right to have execution of that property. 2dly. It was not neceſſary for the defendant to allege in the *ſcire facias* that the bankrupt had not paid 15*s.* in the pound; the payment of ſuch a dividend (if it were ever made) ſhould be pleaded by the defendant, by way of defence. The ſtatute 5 *Geo.* 2. *c.* 30. *ſ.* 9. ſays "The future eſtate and effects of ſuch perſon ſhall remain liable to his creditors (the tools of trade &c. excepted,) unleſs the eſtate of ſuch perſon ſhall produce ſufficient to pay 15*s.* in the pound" &c. It is ſufficient therefore for the plaintiff to allege in the *ſcire facias* the ſecond bankruptcy of the defendant, and his having acquired property ſince ſuch bankruptcy; and if the defendant has paid the dividend mentioned in the ſtatute, it will be a reaſon for him to ſhew, according to the language of the writ, why execution ſhould not iſſue. A *ſcire facias* is only notice to the defendant, to give him an opportunity of ſhewing cauſe why the execution ſhould not iſſue. But the plaintiff has no means of knowing whether or not the bankrupt has paid that ſum: if he were to ſtate the non-payment, it would be merely alleging a negative; and as he could not be expected to prove the negative, it was not neceſſary for him to allege it.

Lord Kenyon, Ch. J. The writ ought to ſtate all thoſe circumſtances that entitle the plaintiff to the execution prayed by him, and one of thoſe is the non-payment of a certain dividend out of the bankrupt's eſtate at the time of ſuing out the writ.

Here

GILL *againſt* SCRIVENS.

Here indeed it is alleged in one part of the writ that the defendant's eſtate had not at any time produced ſufficient to pay every creditor 15s. in the pound &c: but that allegation is confined to the time of the defendant's diſcharge out of cuſtody, and does not extend to the time of iſſuing the writ.

LAWRENCE, J. When this caſe firſt was before the Court, I threw out a doubt whether the payment of the dividend of 15s. in the pound, if any ſuch had been made, muſt not be pleaded by the defendant: but on conſidering that point, I am of opinion that in this caſe it was incumbent on the plaintiff to ſtate the non-payment of any ſuch dividend. In 1 Ld. *Raym.* 120. *Treby*, Ch. J. ſaid "The difference is where an exception is incorporated in the body of the clauſe, he who pleads the clauſe ought alſo to plead the exception (a): but when there is a clauſe for the benefit of the pleader, and afterwards follows a proviſo which is againſt him, he ſhall plead the clauſe and leave it to the adverſary to ſhew the proviſo." Now here the exception is not in a ſubſequent proviſo but in the body of the clauſe which ſubjects the bankrupt's future eſtate and effects to the payment of debts; "the future eſtate &c. ſhall remain liable &c, *unleſs* it ſhall produce ſufficient &c." Therefore, according to the rule laid down in Lord *Raymond*, it ought to have been alleged by the plaintiff in this caſe that the bankrupt's eſtate had not paid 15s. in the pound at the time of ſuing out the writ; inſtead of which he has only alleged that the bankrupt's eſtate had not paid that dividend at the time of the bankrupt's diſcharge out of cuſtody.

Per Curiam, Let the writ be quaſhed.

(a) See alſo *R.* v. *Sparling*, 1 *Stra.* 497; *R.* v. *Jarvis*, 1 *Burr.* 148. 153; and *R.* v. *Pratten, ante,* 6 vol. 559.

JACOBS *againſt* MINICONI.

Friday.
Nov. 18th.

The death of the defendant between the commiſſion day and day of trial is not a ground for ſetting aſide a verdict for the plaintiff.

THIS was a rule to ſhew cauſe why the verdict given for the plaintiff and the judgment entered thereupon ſhould not be ſet aſide, on the ground that the defendant died before the trial of the cauſe, of which the plaintiff had notice.

Garrow now produced an affidavit in anſwer to the rule, ſetting forth that the defendant did not die until after the firſt day of the Sittings, at which the cauſe was tried; and inſiſted that this caſe was remedied by the ſtatute 17 *Car.* 2. *c.* 8., which enacts that the death of either party after verdict ſhall not be alleged for error. The verdict in this caſe, though given on a ſubſequent day at the Sittings, referred back to the firſt day of thoſe Sittings.

Baily in ſupport of the rule. This caſe is not within the ſtatute, becauſe here the party died *before verdict*; and the ſtatute has never yet been extended to a caſe circumſtanced like the preſent. There is indeed an anonymous caſe in 1 *Salk.* 8. (*a*), where the Court ſaid, that ſuch ought to be the conſtruction of the ſtatute: but that was an extrajudicial opinion, for the defendant in that caſe died before the commiſſion day of the aſſizes. But

The Court ſaid that all the Sittings are conſidered in law as only one day; that of courſe all the verdicts given referred to the firſt day; and that the conſtruction of the ſtatute adopted in the caſe in *Salkeld* had always prevailed.

Rule diſcharged.

(*a*) In that caſe the Court ſaid "If he died upon that day [the commiſſion day of the Aſſizes] though at one o'clock in the morning, it would be helped by the ſtatute, which provides that the death of either party after verdict ſhall not be a cauſe to reverſe the judgment; for ſuch a caſe would be within this ſtatute, inaſmuch as the whole aſſizes are but one day in law, and this is the commiſſion day of which there can be no fraction. So a verdict at any time of the aſſizes is before the death of a party who dies upon the commiſſion day, within the notion and equity of a remedial ſtatute, intended for the ſettlement of right." M. S.

Friday,
Nov. 18th.

The KING *againſt* W. WILLIAMSON.

The proſecutor of an indictment for ſtopping a common footway, who had uſed it for ſome years before it was ſtopped, is a party grieved within the meaning of 5 *W.* & *M.* *c.* 11. *ſ.* 3.

THIS was an indictment for ſtopping up an ancient and common footway, which the defendant removed by *certiorari*. At the trial at the Aſſizes at *Ayleſbury*, a verdict was found for the Crown; and now the queſtion was, whether *J. Fowler*, who was the proſecutor, and who appeared to have uſed this way for ſome years before it was ſtopped up by the defendant, but had ſince been obliged to take a more circuitous route, were entitled to coſts under the ſtatute 5 *W. & M. c.* 11. *ſ.* 3., which enacts that if the defendant proſecuting the writ of certiorari be convicted of the offence for which he was indicted, this Court ſhall give reaſonable coſts to the proſecutor, *if he be the party grieved or injured, &c.*

The Court thought that the proſecutor muſt be conſidered as the party grieved, and as ſuch entitled to coſts; they therefore made the rule abſolute againſt the defendant for the coſts.

Wilſon in ſupport of the rule.

Erſkine againſt it.

The King *againſt* John Barwick.

Saturday, Nov. 19th.

Where ſeveral perſons hold land in partnerſhip, ſome of whom actually reſide on and occupy it, and others reſide at a diſtance, in another pariſh, the latter as well as the former are bound to take pariſh apprentices, if in other reſpects they are fit perſons to take them.

A Poor child was put out as an apprentice by the overſeers of the townſhip of *Hunſlet* to *John Barwick* a ſurgeon and apothecary, reſident in *Leeds*, and the indenture was duly allowed. Upon appeal, the Court of Quarter-Seſſions confirmed the appointment and indenture, ſubject to the opinion of this Court on the following caſe.—The appellant is a partner with eleven other perſons in a manufactory of earthen ware, in the townſhip of *Hunſlet*. Two of the partners are reſident within the townſhip, and now have or have had each an apprentice bound and indentured to them by the overſeers of *Hunſlet*, which they took without objection. The apprentice was appointed and tendered to the appellant to be his apprentice individually. The appellant is not reſident in *Hunſlet*, but at *Leeds* the adjoining townſhip. The partnerſhip is rated for buildings and land in *Hunſlet* to the amount of 270*l.* a-year, of which 23*l.* a-year is the appellant's. There are ſeveral perſons living in *Leeds* who have had apprentices from *Hunſlet* in reſpect of lands they individually occupy there; and there is not any perſon living in *Leeds* or *Hunſlet* who is rated for the poor of *Hunſlet* to that amount who has not had a pariſh apprentice from that town. The other partners are reſident at a diſtance, ſome at *Mancheſter*, ſome at *Ferrybridge*, and other places. The juſtices were of opinion that the appellant was in every reſpect a proper perſon to take an apprentice, if bound by law to take one. The queſtion therefore ſubmitted is, whether under theſe circumſtances the appellant is liable to have ſuch apprentice appointed and tendered to him, being ſo reſident and a partner as aforeſaid, by the overſeers of the townſhip of *Hunſlet*.

Law and *J. Heywood* in ſupport of the order of Seſſions, after obſerving that the Court below had determined the queſtion of fitneſs, were ſtopped by the Court.

1796.

The King *againſt* J. Barwick.

Chambre, *Chriſtian*, and *France*, *contrà*. This caſe is diſtinguiſhable from that of *R.* v. *Clapp* (*a*), becauſe there the defendant, who was held liable to take a pariſh apprentice though reſiding out of the pariſh, was the actual occupier of lands within it; and the actual occupation was the very ground of deciſion, as well in that caſe as in a ſubſequent one of *R.* v. The Directors and Guardians of *Tunſtead* and *Happing* (*b*), and alſo in the authorities there cited. The reaſon of ſuch a conſtruction is manifeſt, to prevent the reſt of the inhabitants from being burthened beyond their juſt proportion, which would be the caſe, as was ſaid in *Jeffrey's* caſe (*c*), if that portion of property in the pariſh on which the occupiers did not reſide was therefore not to contribute to the maintenance of the poor. But that reaſon does not apply here; becauſe there are perſons in the actual occupation of the eſtate in reſpect of which the appellant is rated, and who are ameſnable to all parochial burthens in proportion with the other inhabitants. By 43 *Eliz.* *c.* 2. *ſ.* 1. perſons are only bound to contribute to parochial charges either in reſpect of their perſonal viſible property when actually inhabiting within the pariſh, or in reſpect of the mere occupation of real property. This diſtinction is neceſſarily to be implied from the words of the act. Now the appellant could not be liable to take the apprentice in reſpect of his perſonal ſtock which he held in partnerſhip with the others, becauſe he was not actually reſident within the pariſh; nor in reſpect of his intereſt in the land, becauſe he was not in the actual occupation of it. The caſe of a partner is not like that of a ſervant, the occupation of whom is that of the maſter and not his own: but one partner may well have a ſpecial occupation of that, the profits of which he has in common with others. As to the adjudication of the appellant's fitneſs to take an apprentice, that is immaterial if in law he is not bound to take one.

Lord Kenyon, Ch. J. Pariſh apprentices are to be bound to maſters in reſpect of their inhabitancy or occupation of lands within the pariſh. This is one of the modes pointed out by the ſtatute 43 *Eliz.* of relieving the poor; and every perſon ought to bear this burden in reſpect of his property. Here it is ſtated that the appellant occupies lands in the pariſh to the amount of 23*l.* *per annum*, that being his aliquot part of the whole; and in reſpect of that oc-

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(*a*) *Ante*, 3 vol. 107.

(*b*) *Ib.* 523.

(*c*) 5 *Co.* 67.

cupation he is bound, according to the caſe of *R.* v. *Clapp*, to take the apprentice. It has been taken for granted in the argument of this caſe that the appellant is not an inhabitant: but the contrary is moſt clear, according to the conſtruction put on the ſtatute 22 *H.* 8. *c.* 5., which makes the *inhabitants* of counties liable to the repair of bridges. Lord *Coke* (*a*), in his comment on that ſtatute, ſays that perſons having lands in their own poſſeſſion, though dwelling in a foreign county, are inhabitants. And that doctrine has never been doubted from that time to the preſent. On the authority of the caſe of the *King* v. *Clapp* I am of opinion that this order muſt be affirmed.

Lawrence, J. The argument againſt the order proceeds on this ground, that there was an occupation of the partnerſhip land and houſes by two of the partners to the excluſion of all the reſt: but that is not ſo; for each of the others may go and reſide there, if he pleaſe.

Per Curiam, Order of Seſſions confirmed.

(*a*) 2 *Inſt.* 702.

Jackson *againſt* Barnard.

Saturday, Nov. 19th.

An attorney plaintiff may ſue by common proceſs and indorſe his own name on the copy as the attorney, and may afterwards declare by another attorney.

THE plaintiff, an attorney, ſued by original, a copy of which he ſerved on the defendant indorſed "*J. Jackſon*" in perſon. He then declared "by his attorney *H. Roſſer*"; and gave notice of declaration in the name of *J. Jackſon*. Whereupon

Wigley, for the defendant, moved to ſet aſide the proceedings for irregularity, on two grounds: 1ſt. That as the plaintiff had declared by attorney the proceſs ſhould have been indorſed with the name of an attorney. 2dly. That, if the proceſs were conſidered as having been ſued out by himſelf, it was irregular to declare by attorney.

Sed per Curiam. There is no foundation for either of the objections. An attorney may, if he pleaſe, ſue as a common perſon, and may uſe his own name as the attorney. And he may alſo declare by another attorney.

Therefore a rule to ſhew cauſe was refuſed.

Tueſday, Nov. 22d.

The HUDDERSFIELD CANAL COMPANY *againſt* BUCKLEY.

By a navigation act the ſhares were declared to be veſted in the ſubſcribers their executors and *aſſigns*, with power to the ſubſcribers to aſſign their ſhares; and a committee, to be appointed under the act, were authorized to make calls on the proprietors of ſhares at ſuch time as they ſhould think fit: held that an original ſubſcriber is not liable for any call made by the committee after aſſigning his ſhare. The ſame act impowered the company to ſue for calls &c. "by action of debt *or on the caſe*:" held that an action on the caſe in tort lay.

THIS was an action on the caſe in tort. The declaration ſtated that the defendant had ſubſcribed to advance the ſeveral ſums of 500*l.*, 100*l.*, and 200*l.* towards making and maintaining the *Huddersfield* canal, mentioned in the ſtatute 34 *Geo.* 3. *c.* 53., and in reſpect of ſuch ſubſcription had become one of the proprietors of the *Huddersfield* Canal Company, and an owner of and entitled to eight ſhares in the undertaking; that afterwards, to wit, on the 11th of *July* 1794, the committee of the company, duly choſen &*c.*, by virtue of the powers of the act made a call of 10*l. per cent.* on the proprietors in reſpect of the ſhares which they reſpectively held to carry the act into execution, and directed that ſuch call ſhould be paid to *J. Brook*, one of the treaſurers to the company, at the times and in the proportions therein mentioned, and (amongſt others) 3*l. per cent.* on ſuch call on the 25th of *Nov.* then next; and 5*l. per cent.* on ſuch call on the 28th of *Feb.* next; and that the committee gave regular notice of ſuch call &c, as directed by the act. The ſecond count ſtated that on the 5th of *March* 1795 the committee made a further call of 10*l. per cent.*, and directed that 5*l. per cent.* thereof ſhould be paid on the 9th *June*, and 5*l. per cent.* on 28th of *July* then next. The third count was for 8*l. per cent.* directed by a third order of the committee made on the 29th of *July* 1795, to be paid on the 28th of *October* then next. And the fourth count was 10*l. per cent.* directed by another order of the committee, on the 23d of *Nov.* 1795, 5*l. per cent.* of which was to be paid on the 4th of *Feb.* then next, and the remaining 5*l. per cent.* on the 18th of *March* then next. The declaration then ſtated that though the proportions of the ſaid calls in reſpect to 300*l.* (being three of the ſaid eight ſhares) had been duly paid to the plaintiffs, the defendant had not paid the ſeveral proportions of 500*l.* reſidue of the ſaid ſeveral ſums of 500*l.*, 100*l.*, and 200*l.* ſo ſubſcribed by the defendant as he was directed &*c.*, amounting to 180*l.* but neglected ſo to do &*c.*

The defendant paid 40*l.* into court on the firſt count, and pleaded the general iſſue, not guilty.

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At the trial at the laſt Aſſizes at *York*, before *Rooke*, J., a verdict was given for the plaintiffs, damages 146*l.* 14*s.* 1¼*d.*; 140*l.* being the amount of the calls ſtated in the three laſt counts; 2*l.* 14*s.* 4*d*½. being intereſt of the 40*l.* paid into court by the defendant on the firſt count; 3*l.* 12*l.* 8¼ *d.*, being intereſt of the ſeveral calls ſtated in the three laſt counts from the ſeveral times when thoſe calls became due to the day of the plaintiffs ſuing out their writ; ſubject to the opinion of this Court on the following caſe.

On the 30th of *May* 1793 the defendant and many other perſons ſubſcribed an inſtrument duly ſtamped, not under ſeal, by which they agreed to ſubſcribe the reſpective ſums ſet oppoſite to their names towards the expences of ſoliciting the act in queſtion and of making and maintaining the canal *&c.*, and agreed to pay ſuch ſums to the treaſurer when called upon for that purpoſe, *&c.* The defendant ſubſcribed for five ſhares and two ſhares, and afterwards ſubſcribed for another ſhare. By the ſtatute 34 *Geo.* 3. *c.* 53. the ſubſcribers were incorporated by the name of the *Huddersfield* Canal Company, and were empowered to make the calls ſtated in the declaration, which were regularly made as ſtated in the declaration. The firſt proportion of the firſt call, being 2*l. per cent.*, was paid by the defendant on all the eight ſhares ſo ſubſcribed for by him; and the remainder of that call being 8*l. per cent.* on his remaining five ſhares, amounting to 40*l.* was paid into court by the defendant; and the calls on the three other ſhares were paid by *R. Gray*, the purchaſer of them. On the 6th of *Auguſt* 1794 the defendant ſold five of his eight ſhares to *J. Kelſall* at a profit of 17*l. per cent.* on each ſhare, and transferred his intereſt therein to *Kelſall* by a proper transfer, regiſtered by the Company's clerk. On the 4th of *December* 1794 the following entries were made in the plaintiffs' books by their agents, "*J. Buckley*; firſt ſubſcription 500*l*; ſecond ditto 100*l.*; ſubſcription as a land-owner 100*l.*; ſubſcription as a mill owner 100*l.*—1794 *July* 9th. By transfer to *R. Gray* 300*l.*; *Auguſt* 6th ditto to *J. Kelſall* 500*l.*" By a correſponding entry alſo in the books, under the name of *J. Kelſall*, the transfer of 500*l.* to him from *Buckley* was ſtated.

The queſtions for the opinion of the Court were, 1ſt. Whether the plaintiffs can recover in this action the amount of the ſubſcriptions demanded by the declaration; 2dly. Whether the defendant be liable to pay intereſt on the call paid into court from the time it was ordered by the committee to be paid to the treaſurer, and on the calls mentioned in the three laſt counts from the reſpective days when thoſe calls were required to be paid until payment thereof.

The parts of the act of parliament relative to this caſe are ſect. 1, 62, 63, 64, 65, 70, 71, 72, 73, 74, 79, and 119. By ſect. 1. after reciting the public utility of the meaſure, and that the perſons therein named were deſirous at their own coſts and charges to make and maintain the intended canal, certain perſons by name, among whom are the defendant and *T. Kelſall*, and their reſpective ſucceſſors executors adminiſtrators and *aſſigns* are incorporated. By ſect. 62. power is given to raiſe 184,000*l.* to be divided into ſhares; which by ſect. 63. are to be ſhares of 100*l.* each, and ſhall be veſted in the perſons ſubſcribing and their executors adminiſtrators and *aſſigns* in proportion to the ſums they ſeverally ſubſcribe; and perſons having ſuch ſhares are directed to pay a proportionable ſum towards carrying on the undertaking as thereafter directed. By ſect. 64, The names and deſcriptions of perſons entitled to ſhares, with the number of their ſhares and amount of their ſubſcriptions, and the numbers by which each ſhare is diſtinguiſhed, are to be entered in a book belonging to the Company, and tickets to be delivered to each ſubſcriber, ſpecifying the ſhare &c; and ſuch tickets are to be evidence of the title of the ſubſcribers. The form of the ticket is this, "*A. B.* is a ſubſcriber &c. of the ſhare &c. No. 1. and the ſaid *A. B.* his executors adminiſtrators or *aſſigns* is and are entitled &c." By ſect. 65. perſons who have ſubſcribed, and their executors adminiſtrators and *aſſigns*, ſhall be deemed proprietors &c. and ſhall have votes at the meetings &c. for ſuch ſhares. Sect. 71. and 72. mention ſhares *or* ſubſcriptions. By ſect. 73. a book is to be kept, containing the names of the perſons who ſhall from time to time become proprietors or entitled to ſhares &c. By ſect. 74. power is given to a committee (who are to be elected according to the directions in ſect. 70.) to make calls for money on the proprietors; it directs the owners of ſhares to pay &c.; and adds "if any perſon ſhall neglect to pay his proportionable ſhare of the money to be called for by the firſt call &c. it ſhall be lawful for the Company to ſue for and recover the ſame in any of his majeſty's courts of record by action of debt *or on the caſe*;" and if any perſon ſhall neglect to pay his proportionable ſhare of the money to be called for after the firſt call he ſhall forfeit 5*l.* for every ſhare; and if he ſhall

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neglect to pay &c. for the ſpace of three months after the time eppointed &c., he ſhall forfeit his ſhare for the benefit of the other proprietors &c. By ſect. 79. the proprietors may ſell ſhares; and duplicates of the aſſignments of ſhares are to be delivered to the committee, and an entry thereof made in the Company's books; and after ſuch aſſignment, the purchaſers are to have ſhares in the profits, and to be entitled to vote as proprietors. By ſect. 80. no ſhare is to be ſold after the call of any money until ſuch money is paid. By ſect. 119. ſubſcribers are required to pay the ſums by them reſpectively ſubſcribed or ſuch proportions thereof as ſhall from time to time be called for by the committee &c; "and in caſe any perſon ſhall neglect to pay the ſame at the time required, it ſhall be lawful for the Company *to ſue for and recover the ſame in any court of law or equity*."

Topping, for the plaintiffs, anticipated the three objections which would be made on behalf of the defendant; 1ſt. That the action could not be maintained in it's preſent form; 2dly. That no intereſt is payable on the calls made by the committee after non-payment of thoſe calls; 3dly. That the aſſignment to a purchaſer diſcharges the original ſubſcriber from all future reſponſibility; and then contended that they were without foundation. Anſwer to the firſt; whenever an act of parliament requires a perſon to do a thing, or to pay a certain ſum of money for the benefit of another, and the other neglects to do it, the former may ſue him in an action on the caſe. But it is not neceſſary to reſort to that general argument in this caſe; for the 74th ſection enables the Company to ſue any proprietor for ſums of money ordered by the committee to be paid by action of debt *or on the caſe*. This form of action therefore is warranted by the expreſs words of the act of parliament, which are not "by action on the caſe in *aſſumpſit*," but generally "action on the caſe." And even if the meaning of theſe words were doubtful, the defendant by paying money into court on the firſt count has admitted a right of action in the plaintiffs. *Cox* v. *Parry*, *ante*, 1 *vol.* 464. Secondly, the plaintiffs are alſo intitled to intereſt on the calls. The money ordered on a call is a certain liquidated demand; the inſtant that money was payable the plaintiffs had a right to it, and were entitled to recover damages for the non-payment of it. Beſides, it is now too late for the defendant to make this objection, the jury having given intereſt by way of damages. Thirdly, the

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aſſignment by an original ſubſcriber to a purchaſer does not diſcharge the former from his reſponſibility under the act. The original ſubſcribers are the perſons on whoſe credit the ſcheme was begun, and on which the Legiſlature gave their ſanction to the meaſure. They are the perſons named by the Legiſlature, not merely to begin the undertaking, but alſo to carry it into execution; the act reciting that thoſe perſons were deſirous at their own coſts and charges to make and maintain the canal &c. And if it were competent to them to throw the burden on others, the aſſignments might be made to beggars, and thus the Legiſlature would be deceived, the owners of land through which the canal paſſes would be injured, and the public deprived of the benefit which the Legiſlature intended they ſhould derive from the undertaking. This is like the caſe of a leaſe, in which though the leſſor conſents to the leſſee's aſſigning to a third perſon, he does not give up his remedy againſt the original leſſee. The power given by the act to the ſubſcribers to aſſign was merely introduced for the benefit of the ſubſcribers; but there is no part of the act that diſcharges them from their original reſponſibility on their aſſigning: on the contrary, by ſect. 119, which was inſerted in the act after the power of aſſigning was given, they are required to pay their ſubſcriptions; and that clauſe is nugatory, unleſs it has the effect of continuing the reſponſibility in the original ſubſcribers.

Yates contrà. Firſt, the action is not maintainable in this form. It is brought for a mere breach of contract, in not paying a ſum of money; and whether it be a private agreement between the parties, or ratified by act of parliament, the non-payment of a ſum according to the agreement not under ſeal can only be the ſubject of an action of aſſumpſit. The non-payment of the ſum in queſtion cannot be conſidered as a breach of duty ſo as to convert it into a tort. The Courts have at all times been anxious to preſerve the boundaries of action; and when a plaintiff's cauſe of action ariſes on a contract to pay a ſum of money, he ought to ſue in aſſumpſit, otherwiſe the defendant is deprived of the privilege, to which he is entitled, of a ſet-off. With regard to the words "action on the caſe;" they muſt be underſtood according to the ſubject matter to which they are applied; and being applied here to the caſe of a breach of contract they muſt be underſtood to mean "action on the caſe in *aſſumpſit*." Secondly, at all events the defendant is not

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liable to pay intereſt on theſe calls. Thirdly, conſidering the whole ſcope and meaning of this act of parliament, an original ſubſcriber by the transfer of his ſhares and the acceptance of the aſſignee by the Company ceaſes to have any connexion whatever with the Company, and is thereby diſcharged from every future demand that the Company may make on him in reſpect of thoſe ſhares. By the act certain perſons and their executors adminiſtrators and *aſſigns* are incorporated; expreſs power is given to the original ſubſcribers to aſſign their ſhares; the ſhares are declared to be veſted in the ſubſcribers and *their aſſigns;* and throughout the whole act the aſſignees of ſubſcribers are mentioned as ſtanding in the ſituation of the original ſubſcribers. By ſect. 65. perſons who have ſubſcribed and their aſſigns are deemed proprietors, and are entitled to vote at all meetings; that is, the original ſubſcribers have a right of voting until they aſſign, and then that power is transferred to their aſſignees. Then it would be highly unjuſt that the original ſubſcribers ſhould continue liable to the demands of the Company after they have parted with their right of voting and that property in reſpect of which only they ever became liable, and after the entire management of the Company has paſſed into other hands. With regard to the ſuppoſed analogy between this caſe and that of leſſor and leſſee; though the leſſee is not diſcharged from his *covenants* by aſſignment and by the leſſor's accepting the aſſignee, yet after ſuch an aſſignment the leſſee is not liable for rent in an action *of debt* (*a*), that being founded on the enjoyment of the land; and there being no covenant in this caſe, that analogy is in favor of this defendant.

Lord KENYON, Ch. J. Though I am of opinion with the plaintiffs upon the two firſt points, I am clearly of opinion with the defendant on the laſt. I think that the action is maintainable in this form, the act having ſaid in expreſs terms that the Company may ſue by *an action on the caſe*, and the plaintiffs having ſtated in their declaration every thing that the act of parliament requires. Nor is there any doubt but that the jury may give intereſt, not eo nomine as intereſt, but as damages for the detention of the debt, for non-performance of the contract. But the laſt point is equally clear againſt the plaintiffs. And not entertaining any doubt upon it, as it is a matter of infinite moment to the great maſs of property embarked in this kind of ſpeculation,

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(*a*) Vid. 1 *Brownl.* 20. *Walker*'s caſe, 3 *Co.* 24. *Marſh* v. *Brace*, *Cro. Jac.* 334. *Thurſby* v. *Plant*, 1 *Saund.* 40. and *Wadham* v. *Marlowe*, *E.* 25 *G.* 3. *B. R.* cited in 1 vol. 91.

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I think we ought not to order a ſecond argument leſt an idea ſhould go abroad that we have any doubts. On looking through the act of parliament, it is clear that the Legiſlature meant that the parties ſhould only be liable to the payment of their ſhares ſo long as they individually continue members of this Company, that is, ſo long as they have property which conſtitutes them ſuch. The perſons, who have the right of voting, are to vote in reſpect of their ſhares. The act alſo ſays that perſons who have ſubſcribed and *their aſſigns* ſhall be deemed proprietors: but it would be ridiculous to determine that a perſon, after he has ſold his ſhares in reſpect of poſſeſſing which only he became a proprietor, ſhould ſtill continue to be a proprietor. After aſſignment the aſſignees hold the ſhares on the ſame conditions, and are ſubject to the ſame rules and orders, as the original ſubſcribers, and are to all intents and purpoſes ſubſtituted in the places of the original ſubſcribers. One reaſon however now urged why the original ſubſcribers ſhould always continue reſponſible is, becauſe perhaps the ſhares may be aſſigned to inſolvent perſons: but the Legiſlature, when they gave their ſanction to this undertaking, did not ſuppoſe that it was a mere *South-ſea* ſcheme; they thought it a beneficial undertaking for the public, and conceived they had introduced a ſufficient check by enacting that, if the ſubſcribers did not pay their money from time to time as they ſhould be required by the committee, they ſhould forfeit their reſpective ſhares; and that no ſubſcriber ſhould part with his ſhare while he was in arrear to the Company. No miſchief therefore is likely to enſue either to the Company or the public from this conſtruction of the act. I think that every clauſe in the act of parliament leads to this concluſion, that the perſons liable to the calls are thoſe only who continue to be at the time when the calls are made members of this corporation. Here the defendant had aſſigned his ſhares, and that aſſignment had been entered in the Company's books, before the calls ſtated in the three laſt counts of the declaration were made, and therefore he is not liable to pay them: but he is liable for the calls ſtated in the firſt count, and not having paid them at the time, and the jury having given intereſt on them by way of damages, the plaintiffs are intitled to that laſt ſum on the firſt count, the money paid into court on that count only covering the principal ſum.

Ashhurst, J. There is no doubt reſpecting the principal queſtion. The original ſubſcribers have power to aſſign their

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ſhares to whomſoever they pleaſe: then it would be ſtrange to ſay that after diſpoſing of their ſhares they ſhould ſtill continue liable to all the burdens which are thrown on the owners of this property. The point however does not reſt on general reaſoning; for the only reſtriction impoſed by the act on the power of alienation is that the owners ſhall not aſſign until all the money due at the time of aſſigning is paid: but in all other caſes the ſubſcribers may aſſign their ſhares, and diſcharge themſelves from their liability to future calls by the aſſignment.

Grose, J. As to the form of the action: the words in the act are general "action on the caſe."

Lawrence, J. The only difficulty reſpecting the form of the action is that ſuggeſted by the defendant's counſel, that the defendant is by this mode of declaring deprived of a ſet-off: but that difficulty is not ſufficient to reſtrain the generality of the words uſed in the act of parliament.

Per Curiam, *Poſtea* to the plaintiffs, in order that they may enter up their judgment on the firſt count for 2*l.* 14*s.* 4½*d.* for the intereſt on the 40*l.* paid into court.

Goodtitle on the Demiſe of Owen Jones *againſt* Evan Jones and others; in Error.

Tueſday, Nov. 22d.

Under certain circumſtances the jury may preſume a ſatisfied term to have been ſurrendered to the *ceſtui que uſe*: but if no ſuch preſumption be made, and it appear in a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee who is not joined in bringing the ejectment, the *ceſtui que uſe* cannot recover.

EJECTMENT for lands in *Carnarvonſhire*, on a demiſe on the 20th of *October* 1790. At the trial at the Great Seſſions at *Conway*, a ſpecial verdict was found, ſetting forth the titles of the reſpective parties at length: but the following facts are all that need be ſtated to give riſe to the queſtion on which the caſe was decided.

Both parties claimed under the Reverend *John Jones* Clerk, who before and in 1749 was ſeiſed in fee of the premiſes in queſtion: but there was an outſtanding ſatiſfied mortgage term for 500 years, which had been created in *June* 1690, and which in *November* 1713 had been aſſigned to *J. Lloyd* in truſt for *E. Griffiths* the then owner of the inheritance, and under whom *John Jones* claimed as deviſee. On the 13th of *June* 1749 *John Jones*, who on his marriage had ſettled the eſtate in queſtion on his wife for life, with remainder to himſelf in fee, by will deviſed it (after his wife's death) to his eldeſt ſon *Owen Jones*

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for life, ſubject to certain charges, with power to raiſe 200*l.* by mortgage for younger children; remainder to the iſſue male of *O. Jones*, remainder to his iſſue female; and in default of ſuch iſſue to his ſecond ſon *John Jones* for life, remainder to his iſſue male and female; and in default of ſuch iſſue to his third and fourth ſon *William* and *Thomas Jones* (as before); remainder to his own right heirs. The deviſor afterwards died, leaving thoſe four ſons and a daughter. In *December* 1780 *Owen Jones* by leaſe and releaſe mortgaged the premiſes to *J. Derbiſhire* in fee, for ſecuring 400*l.*: In the releaſe it was declared that the reſidue of a term of 500 years created in *June* 1690 and all other terms (if any ſuch there were) ſhould remain veſted in the ſeveral perſons who were then poſſeſſed of the ſame in truſt for *Derbiſhire*, his heirs, executors, *&c*, for ſecuring the 400*l*; and after payment thereof, in truſt for *Owen Jones* and his heirs, and to be diſpoſed of as he ſhould direct, and in default thereof to wait upon the inheritance, *&c.* In *January* 1782 *Owen Jones* and the repreſentatives of *Derbiſhire* the mortgagee (who was then dead) by leaſe and releaſe conveyed the premiſes in queſtion to *W. Jones* [not one of the ſons of *John Jones* Clerk] in fee for a valuable conſideration, out of which the mortgage money due to *Derbiſhire*'s repreſentatives was paid. On the abſtract of the title delivered to *W. Jones*, when he purchaſed, was this memorandum; "The ſaid *John Jones* (the above deviſor) died inteſtate thirty years ago, and his widow upon whom the above ſettlement was made died in *May* 1780, leaving the ſaid *Owen Jones* their only child." In *June* 1790 *W. Jones* died inteſtate, leaving *Evan Jones*, one of the defendants, his nephew and heir at law, who thereupon entered on the premiſes in queſtion, and has continued in poſſeſſion ever ſince. In *October* 1785 *Owen Jones* died without iſſue; *John Jones*, the ſecond ſon of the deviſor *John Jones*, died on the 2d of *October* 1790, never having entered into or been in poſſeſſion of the eſtate, leaving *Owen Jones*, the leſſor of the plaintiff, his only ſon and heir at law. It did not appear that the outſtanding term created in 1690 had ever been aſſigned by *J. Lloyd* or his repreſentatives before the ejectment was brought: but it was ſtated in the verdict that on the 25th *July* 1793, after the ejectment was brought, adminiſtration of the effects of *J. Lloyd*, unadminiſtered by *G. Lloyd*, was granted to *Griffith Thomas*, who on the 27th of *July* 1793 aſſigned the ſaid term to one *J. Griffith* in truſt for *Evan Jones* the defendant.

On this ſpecial verdict judgment below was given for the leſſor of the plaintiff, to reverſe which a writ of error was brought here.

Jones was to have argued this caſe for the plaintiffs in error, and *Ellis* for the defendant: but when the caſe was called on,

Lord **Kenyon**, Ch. J. obſerved, that on this ſpecial verdict the queſtion between the two litigating parties was not open to diſcuſſion; for that it was ſtated in the verdict that an old term, which was created in the laſt century, had been from time to time aſſigned, and was noticed as a ſubſiſting term ſo lately as in the year 1780 in the mortgage by *Owen Jones* to *Derbiſhire*. That as long as that was in exiſtence, it was an anſwer to an ejectment brought by any other perſon. That though under certain circumſtances a Judge might direct a jury to preſume an outſtanding ſatisfied term to have been ſurrendered by the truſtee, yet if no ſuch preſumption were made, but it was ſtated as a fact that the term ſtill continued, ſuch a legal eſtate in the truſtee muſt prevail in a court of law. That what was ſaid by Lord *Mansfield* in *Lade* v. *Holford* (*a*), "That he would not ſuffer a plaintiff in ejectment to be nonſuited by a term ſtanding out in his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee, but direct a jury to preſume it ſurrendered," muſt be underſtood with this reſtriction, that in either caſe the jury might preſume the term ſurrendered, but that without ſuch ſurrender the eſtate in the truſtee muſt prevail at law, and that to the propoſition ſo qualified he fully aſſented.

Walton, who was alſo counſel for the defendant in error, then ſaid, that the truſtee of this old term was a truſtee for the perſon under whom the defendant in error claimed, and then according to the directions of the ſtatute 1 *Ric.* 3. *c.* 1. the term could not now avail; that ſtatute enacting that "every eſtate, feoffment, gift, releaſe, grant, &c. of lands &c, made by any perſon &c, to any perſon &c, ſhall be good and effectual to him to whom it is ſo made, and to all others to his uſe againſt the ſeller, feoffor, donor, or grantor, of the ſame, and his and their heirs claiming the ſame only as heirs to the ſame ſeller, feoffor, donor, or grantor, and againſt all others having or claiming any title or intereſt in the ſame only to the uſe of the ſame ſeller, feoffor, donor, or grantor, or his or their heirs at the time of the bargain,

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(*a*) *Bull. N. P.* 110.

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ſale," &c. on which Lord *Bacon* in his reading on the ſtatute of uſes made this comment (*a*); "In 1 *Ric.* 3. *c.* 1. cometh the great ſtatute for the relief of thoſe that come in by the party, and at that time an uſe appeareth in his likeneſs; for there is not a word ſpoken of taking the profits to deſcribe an uſe by, but of claiming to an uſe; and this ſtatute ordained that all gifts feoffments grants &c. ſhall be good againſt the feoffors, donors, and grantors and all other perſons claiming to their uſe; ſo as here the purchaſer was fully relieved, and *ceſtui que uſe was obiter enabled to change his feoffees;* becauſe there were no words in the ſtatute of feoffments, grants, &c, upon good conſideration." And in another paſſage (*b*), "There never was any ſtatute made directly for the benefit of ceſtui que uſe, but always for the benefit of ſtrangers againſt ceſtui que uſe and his feoffees; for though by the ſtatute of *Ric.* 3. he might alter his feoffees, yet that was not the ſcope of the ſtatute, *but to make good his aſſurance to other perſons, and the other came in ex obliquo.*"

Lord Kenyon, Ch. J. It ſeems to me that the ſtatute of *Ric.* 3. is not applicable to ſuch a caſe as the preſent: that only applies to caſes where the truſt in it's origin was created for the benefit of the owner of the eſtate; but that is not the caſe now before us; this was a mortgage term created in favour of the mortgagee. But in a court of law we cannot take cognizance of truſts; and we ſhould be confounding the boundaries between the different courts if we were to allow the plaintiff below to recover in this ejectment when there is a legal eſtate in another perſon. I am therefore clearly of opinion that the judgment below muſt be reverſed.

Ashhurst, J. When there are two kinds of eſtates in different perſons, the one equitable and the other legal, the perſon having the equitable eſtate muſt call in aid the legal eſtate before he can recover in a court of law. If there had been a demiſe by the truſtee in this caſe the plaintiff below might have recovered, but he cannot recover on his own title.

Grose, J. The ſtatute of *Ric.* 3. only relates to conveyances originally made for the benefit and uſe of the then grantor; whereas here the mortgage term was not created for the benefit of the grantor but of the mortgagee. Therefore this mortgage term is neither within the words or the meaning of this act of parliament. Then here is a legal term of 500 years veſted in

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(*a*) *Bac. Law Tr.* 332. Edition of 1737.

(*b*) *Ib.* 319.

in the perſon claiming under *J. Lloyd*; and he not having joined in the ejectment, the plaintiff cannot recover. In ſome caſes the jury may preſume the ſurrender of a ſatisfied term, and that gets rid of the difficulty that exiſts in this caſe: but here it appears on the verdict that the term is an outſtanding term.

LAWRENCE, J. I obſerve that the adminiſtration de bonis non of *J. Lloyd* was not obtained until after this ejectment was brought, and therefore the plaintiff could not have laid a demiſe by the truſtee: if the jury however at the trial had preſumed that this term had been ſurrendered to *J. Jones* the deviſee of *E. Griffiths*, the adminiſtration de bonis non of *J. Lloya* would have been out of the way. But as this ejectment is brought by a perſon who it appears by the ſpecial verdict has not the legal title, he cannot recover in a court of law. This queſtion has been much diſcuſſed of late years; it was once doubted whether or not a perſon could recover in ejectment on a clear equitable title: but in *Doe* v. *Staple* (*a*) a majority of the Judges of this Court were of opinion that a plaintiff in ejectment could only recover on a legal title. The ſame queſtion was afterwards argued in the Exchequer chamber before all the Judges (*b*), but a ſecond argument being awarded the caſe was never brought before them again. However, according to the caſe of *Doe* v. *Staple* which came before this Court on a ſpecial verdict, and the judgment in which caſe was never reverſed, I take it to be a ſettled rule that the legal title muſt prevail in a court of law.

With regard to the ſtatute 1 *Ric.* 3. it does not ſeem to me to be applicable to this caſe. The Legiſlature in paſſing that act only intended that where a perſon having an eſtate in poſſeſſion conveyed it to a truſtee to his own uſe, and afterwards conveyed it away to a purchaſer, he ſhould not ſet up the eſtate in the ceſtui que truſt againſt the purchaſer; that is, that he ſhould not take advantage of his own fraud, and ſay that the conveyance to the purchaſer was defective on account of the legal title not being in him, but being in his truſtee.

trustee.

(*a*) *Ante*, 2 vol. 684.

(*b*) *Weakly* dem. *Yea*, Bart. v. *Rogers*. This caſe firſt came before the Court of *B. R.* in *Trin.* 29 *Geo.* 3. on a motion to ſat aſide the verdict for the plaintiff, the point having been reſerved at the trial in *Somerſetſhire*: but on account of the importance of the queſtion, it was converted into a ſpecial caſe, and argued before all the Judges in the Exchequer Chamber in the Michaelmas term following.

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Walton then deſired that a *venire de novo* might iſſue. But

The Court ſaid that a *venire de novo* could only be awarded in caſes where there was a defective finding in the verdict; and that, though a great deal of evidence was unneceſſarily ſtated in this verdict, ſufficient facts were found to ſhew that the plaintiff below could not recover on account of the legal title being in another perſon.

Judgment reverſed.

Wedneſday, Nov. 23d.

The KING *againſt* The Juſtices of the Weſt Riding of YORKSHIRE.

The coroners of franchiſes, that do not contribute to the county rates, are not entitled to the fees given by ſtat. 25 *G.* 2. *c.* 29. or to any fees to be paid by the county.

THIS was a mandamus to the defendants; reciting that it appeared to this Court "on the complaint of *Thomas Lang* Gent. coroner of the liberty and franchiſe of the honor of *Pontefract*, parcel of the Duchy of *Lancaſter* in the ſaid county of *York*," that he had at the General Quarter Seſſions of the peace held, &c, in and for the ſaid *Weſt Riding*, &c, requeſted the defendants or ſuch of them as were there preſent, "to make an order for payment of his fees and travelling expences in reſpect of certain inquiſitions taken by him on view of the bodies of *S. Gibſon* and *E. Pickles*, and at the ſame General Quarter Seſſions returned to them the ſaid juſtices the ſeveral inquiſitions ſo taken by him as coroner as aforeſaid, in order that they the ſaid juſtices might examine and make ſuch order thereupon as the ſtatute in that caſe directs." It then recited that the juſtices had refuſed to examine and make ſuch order, &c, and commanded them at the next Seſſions to make an order, &c.

The defendants returned that the within mentioned inquiſition taken on *S. Gibſon* was taken at the pariſh of *Birſtall* in the ſaid Weſt Riding; and that the other inquiſition was taken at the pariſh of *Thornhill* in the ſame county; that before and at the reſpective times of taking thoſe inquiſitions there were and ſtill are divers coroners of our lord the king of and for the ſaid riding, and duly elected and appointed to the ſaid office of coroner; and that *T. Lang* was not then nor is now one of the coroners of and for the ſaid Riding, &c.

Chambre, for the defendants, admitted that the return was bad, but took ſeveral objections to the mandamus. 1ſt. The ſtat. 28 *Ed.* 3. *c.* 6. directs that coroners ſhall be choſen in full counties,

except

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except in ſeigniories and franchiſes: now here the coroner claims his fees as coroner for a particular franchiſe, without ſhewing any grant, preſcription, uſage, or any other right to be coroner; he ſhould have alleged his title. 2dly. It is not ſtated in the writ that the honor of Pontefract is within the Weſt Riding of Yorkſhire, or that the inquiſitions were taken within the Weſt Riding; ſo that it does not appear that the defendants had any juriſdiction to make the order which they are required by the writ to make.

Lambe, *contrà*, was beginning to anſwer theſe objections: but

Lord Kenyon, Ch. J. ſaid there was another objection to the writ, which alone was deciſive. It does not ſtate that the honor of Pontefract contributes to the county rates, and conſequently the defendants had no authority by the ſtat. 25 *Geo.* 2. *c.* 29. (*a*) to make the order required. The proſecutor ſhould have alleged in the writ all thoſe facts which are neceſſary to ſhew that he was entitled to the relief prayed, and that he had a right to call on the magiſtrates to do that for their non-performance of which he ſued out this compulſory writ.

Per Curiam, Let the writ be quaſhed.

(*a*) Sect. 1. enacts that for every inquiſition taken by a coroner for any townſhip or place contributory to the rates, directed by an act 12 *Geo.* 3. *c.* 29, he ſhall have 20*s.*; and ſect. 5. enacts that no coroner of any liberty or franchiſe not contributory to the county rates ſhall be entitled to any fees under the act, but ſhall only have ſuch fees and allowances as they were before entitled to, or as ſhall be given to them by the perſons by whom they are appointed.

Pickering *againſt* Truste and another.

Wedneſday, Nov. 23d.

Under certain circumſtances the Court will ſtay the proceedings in an action of treſpaſs for ſeizing goods, on the defendant's reſtoring the goods, or paying the full value of them, with the coſts of the action.

TRESPASS againſt the defendants who had ſeized fourteen hides, as viewers and ſearchers of leather, under ſtatute 2 *Jac.* 1. *c.* 22. The defendants, finding they could not juſtify the ſeizure, the leather having been improperly ſeized, applied to the plaintiff's attorney to ſettle the matter, offering to pay the price of the goods and the coſts of the action; to which the attorney ſaid, that the leather was but worth 10*l.*, and that the plaintiff only wiſhed to recover the value, but that he had no authority from the plaintiff to compromiſe, and therefore he referred them to the plaintiff himſelf. The plaintiff, on an application to him, ſaid that he had left the matter to his attorney: and on a ſubſequent refuſal by the plaintiff to accept the value

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of the goods and the coſts, a rule was obtained, before declaration delivered, calling on the plaintiff to ſhew cauſe why, on the defendants' undertaking to reſtore the leather or to pay the value of it to the plaintiff together with the coſts of the action, all further proceedings ſhould not be ſtayed.

Erſkine now ſhewed cauſe againſt that rule; and ſaid, that it appeared that the plaintiff never conſented to take the ſum propoſed, and that this application could not be granted without his conſent, the preciſe value of the goods taken not being neceſſarily the criterion by which the jury muſt be bound; that the quantum of damages to be recovered muſt depend on the circumſtances of the ſeizure and the inconvenience ſuffered by the plaintiff; and that as the declaration was not yet delivered the plaintiff might perhaps introduce in it a per quod, and ſeek to recover ſerious damages, of the quantum of which the Court were not the proper judges.

Lord Kenyon, Ch. J. (ſtopping *Gibbs*, the *Recorder*, the *Common Serjeant*, and *Dampier*, in ſupport of the rule.) Formerly (*a*) ſuch an application as the preſent would not have been ſucceſsful. The Court, in anſwer to an application to bring goods into court, uſed to ſay they had no warehouſe for ſuch purpoſe; and the rule was confined to the inſtance of bringing money into court. But of late years it has been uſual to grant (*b*) ſuch applications as this, when a fit caſe has been brought before the Court for that purpoſe. And this appears to be ſuch a caſe; the officers in ſeizing the goods in queſtion made a miſtake; but no damage whatever to the plaintiff is ſuggeſted, and there ſeems to be no pretence to ſeek for vindictive damages. And as the defendants have offered to make every compenſation which juſtice requires, I think we ought to make this rule abſolute.

Rule abſolute.

(*a*) Vid. *Salk.* 597. *Bowington* v. *Parry*, 2 *Str.* 822. *Olivant* v. *Perineau*, *ib.* 1191. and 1 *Wilſ.* 23. and *Harding* v. *Wilkin*, *Say.* 120.

(*b*) Vid. 3 *Burr.* 1364. and *Cooke* v. *Holgate*, *Barnes* 281. But this appears to be the firſt inſtance *in treſpaſs*.

Wedneſday, Nov. 23d.

MADDOCK qui tam *againſt* Sir B. HAMMET, Knt. and others.

The Court will grant leave to amend in penal actions, even after the time limited for bringing a new action; provided the plaintiff has not been guilty of any unneceſſary delay in proſecuting his ſuit, and the amendment prayed for does not introduce any new ſubſtantive cauſe of action.

A RULE had been obtained, calling on the defendants to ſhew cauſe why the declaration, which was in an action for uſury, ſhould not be amended by altering the times of payment of certain notes in which the uſury was charged to conſiſt. It was admitted that the ſtatute of limitations had run, ſo that no new action could now be commenced. And on this ground

Erſkine ſhewed cauſe againſt the rule; contending that the amendment prayed for was in effect to enable the plaintiff to bring a new action after the time limited by the Legiſlature in ſuch caſes was expired, which was never allowed in penal actions. And he cited *Goff q. t.* v. *Popplewell* (*a*), and *Steel q. t.* v. *Sowerby* (*b*), where ſuch applications had been refuſed.

Gibbs and *Burrough*, *contrà*, denied that any ſuch rule had been laid down, as ſuppoſed, in the caſes cited; for there the Court went on the ground that unneceſſary delay had been uſed by the reſpective plaintiffs; and they thought it contrary to the policy of the law and to the poſitive directions of the ſtatute 31 *Eliz. c.* 5. to permit informers to keep ſuch actions hanging over the heads of defendants for ſiniſter or vexatious purpoſes. In the firſt of thoſe caſes the action had been depending four years; in the ſecond above two years. Whereas here the offence was committed in *September* 1795, and the action commenced in *Eaſter* term laſt; and the plaintiff could not have proceeded to trial before the laſt aſſizes, when he had intended to try the cauſe, and had given notice accordingly, but was obliged to countermand it on account of the abſence of a material witneſs who kept out of the way for fear of an arreſt by the defendants for a conſiderable ſum, in conſequence of which the plaintiff had not been able to ſerve him with a ſubpœna, although it had been taken out above a month before. In *Mace q. t.* v. *Lovell* (*c*) a ſimilar application was granted to amend a miſtake in the ſum lent after the record had been carried down to trial; and there *Aſton*, J. ſaid that amendments had been made after the ſtatute of limitations had run; and that at common law there was no diſtinction in this reſpect between qui tam and

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(*a*) *Ante* 2 vol. 707.

(*b*) *Ante* 6 vol. 171.

(*c*) 5 *Burr.* 2833; and vide *Bondfield* v. *Milner*, 2 *Burr.* 1098. where the Court gave leave to amend as to the date of the note on which the uſury was aſſigned.

civil actions. Finally, the Court granted ſuch an application in *Croſs* v. *Kaye* (*a*), though after the time limited for bringing a new action, on the ground that there had been no unneceſſary delay.

Lord KENYON, Ch. J. This is an application to the diſcretion of the Court; and in theſe caſes we muſt take care that the plaintiff ſhall not unneceſſarily hang his action over the head of the defendant: but no ſuch conduct is imputable to the preſent plaintiff, and the caſe laſt cited is an authority in point for our granting the plaintiff leave to amend, though the time limited for bringing a new action is expired; inaſmuch as the amendment prayed for is not to introduce a new ſubſtantive cauſe of action, but merely to rectify a miſtake in ſetting out the notes.

Per Curiam, Rule abſolute (*b*).

(*a*) *Ante* 6 vol. 543.

(*b*) Ld. *Kenyon* obſerved a miſtake in the report of *Croſs* v. *Kaye*, *ante* 6 vol. 544, in the name of Mr. *Deeds*, which ought to have been Mr. *Deaves*.

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THE KING *againſt* B. SIKES.

After the duties of exciſe are charged on waſh made for extracting ſpirits, by 26 *Geo.* 3. *c.* 73, if any part of the waſh is loſt by accident the manufacturer cannot be relieved from the reſpective proportion of the duty, as for an overcharge.

THE Statute 26 *Geo.* 3. *c.* 73. *ſ.* 1. diſcontinues the former duties granted on low wines and ſpirits for home conſumption, and in lieu thereof grants a duty of 6 *d.* on every gallon of fermented wort or waſh made for extracting ſpirits for home conſumption, payable by the diſtillers. By *ſ.* 2. the duty is put under the management of the exciſe. By *ſ.* 69. the proviſions of former acts are extended to this; and amongſt others the proviſion contained in the 1 *W. & M. c.* 24. *ſ.* 13. whereby juſtices of the peace within whoſe juriſdiction any brewer inhabits, upon complaint made to them of *any overcharge* returned upon him by any of the gaugers, are to hear and determine the ſame, and on due proof diſcharge or acquit ſuch brewer of ſo much of his charge as ſhall be made out. A complaint was made by *John Cook* and others diſtillers for home conſumption before two juſtices of the peace, that the complainants on the 15th of *January* 1795 were charged by the officers of exciſe, ſurveying their diſtillery, in 208 *l.* 2 *s.* 8 *d.* for the duties upon 6244 gallons of waſh, the ſame having been loſt by the burſting of the waſh tub or ſtill in which it was contained, and while it continued to be waſh, whereupon they prayed to be acquitted and diſcharged of the overcharge; and that the defendant *Sikes*, being the collector of exciſe, might ſhew cauſe why they ſhould not be ſo diſcharged. The parties were accordingly

ingly ſummoned, and appearing before the juſtices, *Joſeph Stott* ſupervisor of exciſe depoſed upon oath that the complainants on the 15th of *January* 1795 were and ſtill are diſtillers for home conſumption at *Stratford* in the county of *Eſſex*; that on that day he, as the proper officer, attended at their diſtillery, purſuant to notice of their intention to charge their ſtill with waſh, *&c*, to be diſtilled into low wines and ſpirits, when he gauged the ſaid waſh which was in a veſſel called the ninth-back, and found therein 12,489 gallons of waſh, upon which he charged the duty, and continued in the diſtillery until the whole of the waſh was put into the waſh-ſtill in order to be reduced into ſpirits; that he locked and ſealed the ſtill about ſix o'clock in the ſame evening, and left the premiſes after having made his charge according to the gage, and entered it in his book. That afterwards in the ſame evening about ten o'clock, having received a meſſage from the complainants that the ſtill was burſt, he immediately attended, when he found the fire withdrawn from under the ſtill, which was leaking; and he, at the requeſt of the complainants, unlocked the diſcharge cock, in order to let off the waſh in the ſtill, *to prevent the ſame from ſetting fire to the premiſes*; that the quantity of waſh mentioned in the complaint, *viz.* 6244 gallons, *was thereby by inevitable accident loſt and deſtroyed to the complainants*, *without any fraud or colluſion of them or any other perſon*; that the complainants now ſtand charged in the whole duty on the ſaid 12,489 gallons of fermented waſh; and that the duty upon the quantity ſo loſt amounts to 208 *l.* 2 *s.* 8 *d.* That when the witneſs gauged the waſh and charged the duty thereon, the ſame was in a fermented ſtate, being the ſtate in which the duty is always charged; and that before he returned to the diſtillery at the time the accident happened about half of the whole quantity of waſh with which the ſtill had been charged was drawn off into low wines and ſpirits. The defendant being called upon admitted the facts to be true, but objected to their inſufficiency in law to authorize the juſtices to diſcharge the complainants of the duty; whereupon the juſtices adjudged that the complainants be diſcharged and acquitted of the ſaid 208 *l.* 2 *s.* 8 *d.*, being the duty on the ſaid 6244 gallons of fermented waſh, &c.

This adjudication of acquittal was removed by certiorari into this court, and in laſt Michaelmas term

Wood for the Crown ſtated his objections to it, that the duty had attached, and could not be withdrawn again; and that this was not ſuch an overcharge within the meaning of the acts as gave the magiſtrates juriſdiction to inquire into it. The matter ſtood over with a view to an accommodation, but that failing,

Erſkine now ſhewed cauſe againſt a rule for reverſing the order of the magiſtrates; and contended that within the ſpirit of the acts of parliament this might be conſidered as an overcharge; becauſe owing to the inevitable accident which had happened, the trader had been charged with a duty for a greater number of gallons of fermented waſh than in truth he was ultimately found to be poſſeſſed of. The duty was levied upon the ſuppoſed profit of the trader. Formerly it was collected upon the commodity after it was diſtilled into low wines, which was the next proceſs to making the fermented waſh; but by the late act it was to be taken while it continues in the ſhape of waſh; while it continues in that ſtate any error in the calculation of the quantity may be eaſily corrected, and ought in juſtice to be ſo in this inſtance, becauſe the duty is calculated in this early ſtage with a view to the ſuppoſed quantity that the commodity will yield when it is completely manufactured. Beſides this diminution in the quantity was made by the act of the officer of the Crown; and therefore any preſumption of fraud is entirely removed, againſt which alone all the proviſions of the acts are levelled.

The *Attorney General contrà.* One principal reaſon for removing the duty from low wines to fermented waſh was for the purpoſe of ſubjecting the trader, inſtead of the public, to the hazards attending the ſubſequent ſtages of the manufactory; and the duty was calculated accordingly, with an allowance in reſpect of ſuch poſſible accidents as the preſent. The duty attaches as ſoon as the officer has gauged the waſh and aſcertained the quantity, after which the commodity is at the entire riſk of the diſtiller; and this is ſo well underſtood, that it is frequently the ſubject of inſurance againſt accidental loſſes. The very point in queſtion was decided in favour of the Crown by the Court of Exchequer in *Liptrapp*'s caſe *E.* 36 *Geo.* 3. And it is a point of great importance to the revenue to have it aſcertained, that when once the duty has attached upon any commodity, the public have no concern with any ſubſequent loſs or deterioration, to which it may be ſubject in the hands of the manufacturer. It was the policy of the law to eſtabliſh

bliſh this rule in order to prevent the numerous frauds which were formerly practiſed.

Lord Kenyon, Ch. J. This muſt be acknowledged to be a caſe of hardſhip on the part of the diſtillers; and therefore we wiſhed it to ſtand over to afford them an opportunity of petitioning the Board of Treaſury for relief; but upon the law of the caſe there is no difficulty. I am ſatisfied that this is not one of the caſes over which the Legiſlature intended to give the magiſtrates juriſdiction; but that the clauſe referred to in the ſtatute of *W.* & *M.*, whereby power is given to them upon complaint of any overcharge to afford relief, muſt be confined to overcharges of the duty which were ſuch at the time when the charges were made by the officer. But that clearly does not apply to the preſent caſe; for at the time when the charge was made it was accurately calculated, and the diſtillers were liable to pay the whole duty aſſeſſed upon them. The loſs which unfortunately happened afterwards can in no ſenſe convert this into an overcharge, but is a matter altogether of diſtinct conſideration. The conſequence is that this adjudication muſt be quaſhed, the magiſtrates having acted out of their juriſdiction.

Ashhurst, J. declared himſelf of the ſame opinion.

Grose, J. There can be no doubt on the law of the caſe. The queſtion whether there were an overcharge or not muſt depend ſolely upon the fact whether the duty were charged too much at the time. It appears by the 16th ſection of the 26 *Geo.* 3. *c.* 73. that the duty is chargeable before the waſh is put into the ſtill; which was done accordingly in the preſent caſe. And there being no pretence for ſaying that there was any overcharge at that time, the magiſtrates had no authority to make any allowance in reſpect of the accident which happened afterwards.

Lawrence, J. The time when the charge of duty is to be made is deciſive in the preſent caſe; and as that is required to be done before the waſh is put into the ſtill, and was done accurately in this caſe, there is no ground for ſaying that the diſtillers were overcharged by the officer; and therefore the magiſtrates have acted without any juriſdiction. Neither can it be ſaid that the letting out of the waſh from the ſtill was the act of the officer, as ſuch; for he was then acting as the ſervant and at the requeſt of the owner, who called on him for aſſiſtance in an hour of diſtreſs, and not in virtue of his office.

Order quaſhed.

Wedneſday. Nov. 23d.

The KING *againſt* JOHN STARTIFANT.

An attorney is not liable to be aſſeſſed in the poor rates in reſpect of the profits of his profeſſion.

THE defendant appealed to the Quarter Seſſions at *Preſton* in *Lancaſhire* againſt a poor rate, in which he was aſſeſſed 2*s.* 3*d.* in reſpect of his profits and fees of his profeſſion as an attorney: The Seſſions confirmed the rate, and ſtated the following caſe for the opinion of this Court. The appellant is an attorney at law, and an inhabitant practiſing within the borough of *Preſton.* There are many other attornies alſo inhabiting and practiſing in the borough. The uſage of rating attornies for the profits and fees of their profeſſion firſt commenced by an aſſeſſment made for the relief of the poor in the year 1732, and has ever ſince prevailed, ſuch attornies being rated according to the ſuppoſed profits and fees of their profeſſion or buſineſs; ſome at 12*s.* others at 9*s.* and others at leſs ſums in each rate or aſſeſſment. Objections have frequently been made by the attornies ſo rated to the legality thereof, and in ſome few inſtances payment has from time to time been reſiſted; but no appeal to ſuch rates or aſſeſſments has before been brought to trial. The ſum of 2*s.* 3*d.* is no more than the appellant's juſt proportion or ſhare towards the rate, if in reſpect of ſuch his profits and fees of his profeſſion he is legally bound to contribute any thing towards the relief of the poor of the borough.

Scarlett, who was to have argued in ſupport of the order of Seſſions, admitted that the rate could not be ſupported.

The Court ſaid there was no doubt in the caſe; and they

Quaſhed the order of Seſſions (*a*).

(*a*) Vid. *R.* v. *J. Hogg*, *ante*, 1 vol. 727.; and *R.* v. *White*, *ante*, 4 vol. 771.

Wedneſday, Nov. 23d.

SMITH *qui tam againſt* PRAGER.

In an action for uſury the borrower of the money is a competent witneſs to prove the whole caſe.

THIS was an action for uſury, tried before Lord *Kenyon* Ch. J. at *Guildhall*. In order to prove the caſe, *Bromer* the borrower of the money was called as a witneſs; and he gave in evidence that on the 17th of *September* 1795 he borrowed of the defendant 900*l.* to be repaid on the 3d of *October* following, for which he was to pay 11*l.* as intereſt. That on the 13th *October* 1795 he borrowed of the defendant 2000*l.* more, to be repaid on the 26th of the ſame month, for the loan of which he was to pay 42*l.* and both the principal ſums and intereſt were repaid at the ſtipulated times by *Bromer*'s drafts on his banker, which were duly honoured. That he was ſtill indebted to the defendant in the ſum of 4000*l.* on a running account for this and other loans of money. *Bromer* had before the trial become a bankrupt, and had not obtained his certificate. It was objected at the trial that he was not a competent witneſs, on the ground of intereſt; but Lord *Kenyon*, Ch. J. over-ruled the objection, and the plaintiff obtained a verdict on the counts, ſtating the two tranſactions above mentioned, there being other uſurious tranſactions ſtated in other counts which were not proved.

A rule having been obtained on a former day, calling on the plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial had on this ground,

Law, *Dallas*, and *Giles* were now to have ſhewn cauſe: but the Court deſired

Erſkine, *Garrow*, and *Gibbs*, *contrà*, to ſupport their rule. They contended that the bankrupt was an intereſted witneſs, becauſe he was called upon to impeach the legality of certain money tranſactions, which were items of the general balance that he owed to the defendant; for which if he does not obtain his certificate, the defendant may ſue him directly; and if he does obtain it, he is equally intereſted in diminiſhing the amount of the debt to be proved under his commiſſion; being entitled to the ſurplus of his eſtate, if any, or to an allowance in proportion to the dividend that his eſtate will produce. Even admitting, according to the authority of *Abrahams q. t.* v. *Bunn* (*a*), that *Bromer* would have been a competent witneſs, after other proof had been given, that his drafts were paid, yet here he was called to prove that fact himſelf (*b*), and the repayments ſtated to have been made were merely payments upon the general account between the witneſs and the defendant, and not diſtinct tranſactions. It is true that the Court in the caſe of *Bent* v. *Baker* (*c*) ſeems to have conſidered that the objection only went to the credit of the witneſs, unleſs the verdict in the particular cauſe would be evidence for or againſt him in another ſuit: but they alſo conſidered that an intereſt in the event of the cauſe went to the competency of the witneſs. And here the verdict would be ſuch an impeachment of the tranſactions

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(*a*) 4 *Burr.* 2251.

(*b*) The bankers' clerk alſo proved ſuch and ſuch drafts to have been paid, which *Bromer* ſwore he had given to the defendant.

(*c*) *Ante*, 3 vol. 27.

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Smith *againſt* Prager.

that the Lord Chancellor would not permit the items in the account to be proved under the commiſſion, which would reduce the defendant's balance. In *Bearda q. t.* v. *Aſhton*, in 1788, Lord *Kenyon*, Ch. J. at Niſi Prius refuſed to admit the payee of a note, who had indorſed it, to prove it uſurious until proof had been given by ſome other perſon that the note had been paid. And in a caſe of *Rothero* v. *Elton*, Sittings after *Trin.* 31 *Geo.* 3., which was ſubſequent to that of *Bent* v. *Baker*, the action being brought by one who had chartered a ſhip againſt the under-writer of a policy, upon which a loſs had happened, and the defence being that the ſhip was not ſea-worthy; Lord *Kenyon* refuſed to permit the owner, who was called as a witneſs, to prove the affirmative, on the ground of his being intereſted in the event of the ſuit; becauſe if the defendant had a verdict on that ground, the plaintiff would have a remedy over againſt the witneſs; and yet the verdict in that cauſe could not have been given in evidence in an action againſt the witneſs.

Lord Kenyon, Ch. J. The caſe of *Bent* v. *Baker* laid down a clear and certain rule by which I have ever ſince endeavoured to regulate my opinion in cauſes coming before me at *Niſi Prius*, though probably I may not have decided properly in every inſtance, when called upon to form an opinion on the ſudden. The rule there laid down was, that no objection could be made to the competency of a witneſs upon the ground of intereſt, unleſs he were directly intereſted in the event of the ſuit, or could avail himſelf of the verdict in the cauſe, ſo as to give it in evidence on any future occaſion in ſupport of his own intereſt. We are now called upon to review that deciſion; and the caſe of *Abrahams* v. *Bunn* has been cited. The report of the latter in *Burrow* is a very full one; but I have a MS note of it ſomething fuller. Lord *Mansfield* there ſtated the great doubt and contradiction which had long prevailed in the caſes upon the diſtinction between objections which went to the competency and ſuch as went to the credit only of a witneſs. That the Courts had long been miſled by the authority of Lord *Holt* in deciding the caſe of the *King* v. *Whiting*(a), where upon an indictment for a cheat in obtaining a perſon's ſubſcriptions to a note of 100 *l.* inſtead of 5 *l.*, he rejected the evidence of the maker of the note; becauſe if the defendant were convicted, Lord *Holt* ſaid the verdict would be ſure to be heard

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(a) *Salk.* 283.

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heard of in an action on the note to influence the jury. That this deciſion was followed by Lord *Hardwicke* in the *King* v. *Nunez* (*a*); but that in the *King* v. *Bray* (*b*) his Lordſhip had an opportunity of reviewing his own opinion and that of Lord *Holt*, and was then ſatisfied that the objection went only to the credit and not to the competency of the witneſs; and that, as to *hearing of the verdict*, he, ſitting as a judge, could only hear of it judicially; and if it could not be afterwards given in evidence for the witneſs it was no objection to his competency. Lord *Manſfield* alſo obſerved that ſince the *King* v. *Whiting* great light had been thrown upon the ſubject by three decided caſes; thoſe of *R.* v. *Bray*, the *Eaſt India* Company v. *Goſlen*, and *Bailie* v. *Wilſon* before the delegates. And he laid it down as a rule that the objection to a witneſs on the ground of future intereſt only went to his credit, unleſs the judgment could be given in evidence for him in any other ſuit. Now that was the very point decided in *Bent* v. *Baker*; and therefore the authority of that caſe ſtands fully confirmed. Upon the authority therefore of all theſe caſes I am clearly of opinion that *Bromer* was a competent witneſs in this caſe; and that the objection to the ſituation in which he ſtood went only to his credit, of which the jury alone were to judge.

The other Judges aſſenting,

Rule diſcharged (*c*).

(*a*) 2 *Stra.* 1043.

(*b*) *Rep. temp. Hardw.* 358.

(*c*) Vid. *Bell* v. *Harwood, ante*, 3 vol. 308. S. P.

DOE on the Demiſe of the Duke of BEDFORD *againſt* KIGHTLEY.

Thurſday, Nov. 24th.

A notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady-day which will be* in the year 1795" was held to be a good notice to quit at *Lady-day* 1796.

ON the trial of this ejectment at the laſt aſſizes before Lord Ch. J. *Eyre*, the defendant, who was tenant to the leſſor of the plaintiff, objected to the notice to quit, which was ſerved juſt before *Michaelmas* 1795, and was to quit "at *Lady-day which will be in the year* 1795." The plaintiff's counſel anſwered 1ſt. that this was evidently a miſtake in the notice delivered to the tenant, the copy which was kept by the party ſerving it being in 1796; and that the words, "which will be," that preceded the "year 1795" ſhewed that it was proſpective. 2dly. That there was evidence of a parol notice, the written notice objected

to

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to having been given to the defendant by an agent to the leſſor of the plaintiff after a converſation in which the latter ſaid that as the former would not agree to the terms propoſed for a new leaſe he was directed to give him notice to quit at the *next Lady-day*. The plaintiff however was nonſuited, leave being reſerved to enter a verdict for him if this Court ſhould be of opinion that either the written or the parol notice was ſufficient.

A motion to ſet aſide the nonſuit having been accordingly made on a former day, it was now oppoſed by the defendant's counſel. But,

Lord Kenyon, Ch. J. ſaid the time when the notice was given and the words in it "which will be" manifeſtly ſhewed that this was a notice to quit at the then next *Lady-day*; and the conduct of the parties alſo ſhewed that they ſo conſidered it. Then the year 1795 in the notice may be rejected as an impoſſible year.

Per Curiam, Rule abſolute.

Le Blanc Serjt. and *Wilſon* for the plaintiff.

Sellon and *Beſt* for the defendant.

Thurſday, Nov. 24th.

Owenson *againſt* Morse.

A. agreed to buy ſome articles of plate of *B.*, who was to get *A.*'s arms engraved on them and to pay for the engraving; held that a delivery to the engraver for that purpoſe was not a delivery to *A.* ſo as to defeat *B.*'s right of ſtopping the goods *in tranſitu*, the price of the goods not being paid by *A.*

If the ſeller of goods take notes or bills for them, without agreeing to run the riſk of the notes being paid, and the notes turn out to be worth nothing, this will not be conſidered as payment.

TROVER for ſome articles of plate. At the trial at the laſt *Wincheſter* Aſſizes, it was proved that on the 2d of *April* about 6 o'clock in the evening the plaintiff went to the defendant's ſhop at *Southampton*, and agreed to purchaſe the goods in queſtion of the defendant, a ſilverſmith, at a certain price; and wiſhing to have his arms engraved on them, the defendant ſent for one *Seed*, who uſually engraved for him, to engrave the arms, and who was directed by both parties to bring back the articles to the defendant, who was to pay for the engraving. The plaintiff at the time of the agreement paid the price of the goods in notes of Meſſrs. *Shaw*, who kept a bank at *Southampton*. Before this hour in the afternoon *Shaw*'s houſe was ſhut up for the day; and in conſequence of the failure of a houſe in *London*, *Staples* and Co., at which theſe notes were payable, the houſe of Meſſrs. *Shaw* never opened again; and *Staples* and Co. and Meſſrs. *Shaw* were afterwards declared bankrupts. *Seed*, having engraved the plate, brought it back on the next day (*Sunday*) to the defendant, who

paid

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paid him for his work. On behalf of the defendant it was objected that under theſe circumſtances the plaintiff was not entitled to recover, becauſe the goods had never been delivered to him or to any perſon for him, *Seed* being the ſervant of the defendant and not of the plaintiff, and the plaintiff not having paid for the goods: but Mr. B. *Thomſon*, before whom the cauſe was tried, ſuffered the plaintiff to take a verdict for the amount of the goods, reſerving liberty to the defendant to move to ſet it aſide and to enter a nonſuit, if this Court ſhould be of opinion that the plaintiff was not entitled to recover. And a rule having been obtained on a former day for that purpoſe,

Gibbs and *Pell* now ſhewed cauſe againſt it. 1ſt. The goods were delivered to the plaintiff; or ſecondly he paid for them; and in either caſe the plaintiff is entitled to retain the verdict. Firſt, they were delivered to *Seed*; and a delivery to him for the purpoſe of engraving the plaintiff's arms on them was in law a delivery to the plaintiff. The contract of ſale was complete; by that the property of the goods in queſtion was veſted in the plaintiff, and the mere circumſtance of the notes not being afterwards paid could not reveſt the property in the defendant, there being no pretence to impute fraud to the plaintiff. The ſale transferred the property to the plaintiff, and the right of property carried with it the right of poſſeſſion. The goods had been ſo far delivered to the plaintiff that, according to the caſe of *Lickbarrow* v. *Maſon* (*a*) and other deciſions on this ſubject, there was an end of the defendant's right to ſtop the goods in tranſitu. Secondly, there being no fraud in this caſe, and the plaintiff not knowing that the notes were invalid, as the defendant took them in payment and did not accept them ſpecially and on condition only that they ſhould be paid, he became a purchaſer of the notes. In *Clerk* v. *Mundall*, 12 *Mod.* 203. *Salk.* 124. S. C. *Anonymous*, 12 *Mod.* 408. *Anonymous*, *ib.* 517. *Bull. N. P.* 277. and *Ward* v. *Evans*, 2 *Ld. Raym.* 930. a diſtinction was taken between thoſe caſes where a note is given at the time of the contract in payment for goods ſold (as the preſent caſe is) and thoſe where it is given in payment of a preceding debt; and in the former it is ſaid to be a purchaſing of the note. But even if theſe notes were not taken as payment for the goods ſold, the defendant cannot treat this mode of payment as a nullity: but he may ſue the plaintiff either on his contract for goods ſold and delivered or on the notes.

(*a*) *Ante*, 2 vol. 63. and 1 *H. Bl. Rep.* 357.

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OWENSON *againſt* MORSE.

Burrough and *Durnford*, in ſupport of the rule, were ſtopped by the Court.

Lord KENYON, Ch. J. This is an exerciſe of ingenuity on the part of the plaintiff. It is an unjuſt attempt by him to take from an honeſt tradeſman certain goods which the latter meant to ſell to him on receiving a fair price for them; and the queſtion now is whether the defendant ſhall be compelled to give them to the plaintiff without being paid for them. To be ſure if the law were with the plaintiff, we could only lament it: but the law and juſtice of the caſe are clearly in favour of the defendant. If the defendant had agreed to take the notes as payment and to run the riſk of their being paid, that would have been conſidered as payment, whether the notes had or had not been afterwards paid; and that is all that is proved by the caſes that have been cited; but without ſuch agreement, the giving of ſuch notes is no payment (*a*). Conſider what were the facts in this caſe; the plaintiff went to the defendant's ſhop to purchaſe the goods in queſtion; the price was agreed upon; the goods were not to be delivered then, but were to remain to be engraved at the defendant's expence; and while they continued in that ſituation, according to all the caſes that have been determined on the ſubject of ſtopping goods in tranſitu, they were only in tranſitu, for there had been no complete delivery to the plaintiff. It afterwards turned out that the price totally failed, the notes not being paid; and yet it is contended by the plaintiff that he may retain this verdict; he does not pretend that the juſtice of the caſe is with him, but he ſays he is intrenched in a point of law, and may recover the goods in queſtion, and compel the defendant to bring another action againſt him for the price of them. But I am moſt clearly of opinion that there was no final delivery of the goods to the plaintiff; that as long as they were in the hands of the engraver, who was employed by the defendant, they were at the moſt only in tranſitu, and the price not being afterwards paid that the defendant had a right to retain them.

GROSE, J. This caſe has been argued on behalf of the plaintiff as if the goods in queſtion had been ſold and delivered to him; if they had been delivered to him, the property would have veſted in him, and he might have recovered the value of them in trover: but the fact is otherwiſe; the goods were left either in the poſſeſ-

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(*a*) Vide *Puckford* v. *Maxwell*, *ante*, 6 vol. 54.

ſion of the defendant or of the perſon whom he employed to engrave them; they never were delivered to the plaintiff. I think that under theſe circumſtances the defendant could not recover the value of theſe goods in an action for goods ſold and delivered, though perhaps he might have declared as for goods bargained and ſold without a delivery. The juſtice of the caſe is alſo with the defendant; the plaintiff went to the defendant's ſhop under pretence of buying theſe goods for ready money; that which he gave as money turned out to be worth nothing; and therefore it would be unjuſt that the plaintiff ſhould take the goods without paying the price that he had agreed to give for them.

Lawrence, J. When the plaintiff went to the defendant's ſhop, the underſtanding of the parties was, that if the defendant would let the plaintiff have the goods in queſtion the latter would give him notes which would be paid when preſented: but it turned out that the defendant never could obtain the money for the notes; and therefore there was clearly no payment. Then it was contended that the goods were delivered to the plaintiff: but there is no pretence to ſay that *Seed* was the ſervant of the plaintiff; on the contrary he was the ſervant of the defendant; and, without overturning all the caſes on the queſtion of ſtopping goods in tranſitu, we cannot ſuffer the plaintiff to retain this verdict.

Rule abſolute.

Manton and another Aſſignees of Langwith a Bankrupt *againſt* Moore.

Thurſday, Nov. 24th.

The Defendant, ſheriff of the county of *Leiceſter*, having on the 19th of *January* 1795 taken in execution, at the ſuit of the *Oakham* Canal Company, the goods of the bankrupt, this action was brought by his aſſignees in order to try, amongſt other things, whether a ſecurity given by *Langwith* to the *Oakham* Canal Company, (a bill of ſale dated 24th *October* 1794,) was in itſelf an act of bankruptcy: The cauſe coming on for trial at the Lent aſſizes

A. having contracted with a Canal Company to build locks and bridges on the canal as their engineer, purchaſed timber and other materials for the purpoſe, which were laid on the Company's premiſes on the banks of the canal; and on the Company's advancing money to him they took a bill of ſale of theſe goods, and a ſymbolical delivery of them by a halfpenny: Afterwards the Company took out execution upon a judgment confeſſed by *A.*; and the ſheriff ſeized theſe goods, and *A.* became a bankrupt. Held that *A.* had not ſuch a poſſeſſion of the goods as would enable his aſſignees to take them within the 21 *Jac.* 1. *c.* 19. *ſ.* 11. for the beſt delivery was given that the nature of the goods would admit of, they being before on the Company's premiſes. And held that this bill of ſale was no act of bankruptcy in *A.*

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MANTON and Another *againſt* MOORE.

1796 was referred to the arbitration of a gentleman at the bar; and the *Oakham* Canal Company were by conſent made parties to the rule of court. The arbitrator, being deſirous that his opinion on the point of law might be ſubmitted to the reviſion of this Court in caſe either of the parties ſhould be diſſatiſfied with his judgment, ſtated at length in his award the facts as they appeared to him upon examination with the grounds of his judgment thereon. After ſetting forth the parties to the award and their reſpective intereſts, together with the bill of ſale, (hereafter mentioned) and the queſtion ariſing thereon, as before ſtated, he ſtated that the *Oakham* Canal Company had advanced to *Langwith*, who was employed by them as an engineer, the ſum of 5216 *l.* 0 *s.* 9 *d.* and that the work done by him at that time amounted to 1940 *l.* 4 *s.* 1 *d.* That *Langwith* had beſides expended in articles for the uſe of the canal, and which were then lying upon the banks of it, 1566 *l.* 4 *s.* That at this period he applied to the Company to advance him 600 *l.* more, in order to pay his creditors in Yorkſhire and Lincolnſhire the full amount of their debts: Upon which, as he was conſiderably in arrear to them, they required ſome ſecurity from him for the money which he owed to them; and accordingly a bill of ſale of part of his effects was executed and delivered to them by the delivery of one copper halfpenny on the 24th of *October* 1794. But this bill of ſale extended only to ſuch parts of his effects as were bought with their money, and were then lying upon the banks of the canal which were their premiſes. That the Company meaning to continue him as their engineer took no poſſeſſion of thoſe effects by ſeizing them until the 19th *January* 1795, when diſſatisfied with his conduct they removed him as their engineer, and ſeized the effects; after which he was declared a bankrupt upon another diſtinct and ſubſequent act of bankruptcy.

The bill of ſale referred to, after reciting that by certain articles of agreement dated 23d *May* 1794, between *Langwith* and the *Oakham* Canal Company, the former had covenanted and agreed with the Company to erect 19 locks upon the canal in manner therein mentioned; and that by certain other articles of the 24th of the ſame month he had covenanted with the Company to erect certain bridges over the canal, and that the Company in order the better to enable him to carry on and expedite the ſaid works had advanced conſiderable ſums to him on account; and that *Langwith* had made bricks, and purchaſed timber, lime, ſand, and other materials, for the uſe of the canal, which were depoſited on the

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the line thereof and contiguous thereto, and that he was deſirous to ſecure to the Company the ſums which they had ſo advanced to him on account; he therefore in conſideration of the premiſes and of 5*s.* bargained ſold and aſſigned to them all and every the bricks, clay, timber, lime, ſand, and other materials whatſoever, purchaſed and provided by him for the purpoſe of making and completing the ſaid locks and bridges upon the canal, and then lying and being upon the line thereof contiguous thereto, or elſewhere, and he thereby put the Company into the actual poſſeſſion thereof by delivering to them one copper halfpenny in the lieu and name of poſſeſſion and ſeiſin of all the ſaid materials, &c. And for better ſecurity of the ſame he gave a warrant of attorney to confeſs judgment, dated 24th *October* 1794. Upon theſe premiſes the arbitrator further ſtated that it had been contended before him that every deed of this deſcription was fraudulent, unleſs it was accompanied with the poſſeſſion, except in caſes where the not giving poſſeſſion was conſiſtent with the intention of the parties and the purpoſes for which the deed was made. But the arbitrator being of opinion that a bill of ſale extending only to a part of the effects of a trader was no act of bankruptcy, unleſs it were done in contemplation of bankruptcy; and that ſo far from that being the caſe here, it appeared to him that this ſecurity was given by *Langwith* to the Company under an expectation that they would advance him 600 *l.* more in order to enable him to pay other creditors; and that in point of fact the Company did advance part of that ſum to him ſubſequent to the bill of ſale. He conſidered that *Langwith* could not derive any falſe credit by theſe goods remaining where they were, becauſe from their ſituation they might naturally be ſuppoſed to belong to the Canal Company; or if they could be ſuppoſed to belong to *Langwith*, it muſt be in his capacity of agent to the Company, and to be applied to their uſe. And that according to the doctrine laid down in *Edwards* v. *Harben* (*a*) it was conſiſtent with the intention of the parties that poſſeſſion ſhould not be delivered in any other way, it being the manifeſt intention of the deed that *Langwith* ſhould continue in the execution of his contract with the Company if he conducted himſelf properly; and therefore it would have defeated ſuch intention if they had ſeized upon the goods and ſold them. That the deed was only intended as a ſecurity

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(*a*) *Ante*, 2 vol. 587.

for

for the due execution of his contract; and that in point of fact the goods might be ſaid to be in the poſſeſſion of the Company, becauſe they were ſtated by the deed to be depoſited on the banks of the canal which were their premiſes. For all which reaſons the arbitrator adjudged that the bill of ſale was no act of bankruptcy.

A rule having been obtained to ſhew cauſe why the award ſhould not be ſet aſide,

Gibbs, *Balguy*, *Gally*, and *Torkington*, were now to have ſhewn cauſe (*a*): but the Court deſired to hear the other ſide.

Perceval, *Parke*, and *Vaughan*, in ſupport of the rule. It is clear that *Langwith* was at one time in poſſeſſion of this property, and this was notorious to all the world; and it enabled him to gain credit upon it. The property therefore could not be changed by a ſecret conveyance between the parties unaccompanied with any viſible alteration of the poſſeſſion: but ſuch a deed being itſelf fraudulent and void with reſpect to creditors conſtitutes an act of bankruptcy. *Twyne*'s caſe (*b*) went on the ground of defrauding other creditors. There a deed of aſſignment of goods and chattels was held fraudulent and void, for this, amongſt other reaſons, that the donor continued in poſſeſſion and uſed them as his own. And yet there was a prior debt and a good conſideration as between the parties in that caſe as well as in the preſent. The caſes of *Stone* v. *Grubbam* (*c*), and *Edwards* v. *Harben* (*d*), proceeded on the ſame principle. Now here the poſſeſſion remained to all appearance the ſame after as before the conveyance, and the bankrupt continued to gain a falſe credit as the owner of the goods. And the ſubſequent acts of the parties are deciſive to ſhew that in their own contemplation the poſſeſſion remained in *Langwith* notwithſtanding the conveyance from him to the Company, for they actually ſeized theſe identical goods when they found him upon the eve of bankruptcy, which would have been nugatory if they had conſidered the bill of ſale and delivery of the copper halfpenny a ſufficient poſſeſſion in them before. This therefore ſerves to explain the prior tranſaction, and ſhews that the bankrupt was in the actual poſſeſſion of the goods after the ſecret conveyance from him.

(*a*) Vid. *Collins* v. *Forbes*, *ante*, 3 vol. 316.

(*b*) 3 *Co.* 80.

(*c*) 2 *Bulſtr.* 226.

(*d*) *Ante*, 2 vol. 587.

Lord Kenyon, Ch. J. It has been properly admitted that if ſuch a poſſeſſion of the goods as the nature of the caſe would permit was taken by the Canal Company at the time when the bill of ſale was executed, there is an end of the queſtion. Then it becomes neceſſary to conſider what was the ſituation of theſe parties; the Canal Company, who were carrying on great works, had employed an engineer, and had advanced money to him with which he had procured the goods in queſtion, and depoſited them on the banks of their canal, fit for the purpoſe of being there uſed; theſe materials were of great bulk; and this engineer, ſo being in arrear to the Company, executed to them a bill of ſale of theſe goods then lying on the banks of their canal which were their property. In caſes of this kind the queſtion whether the act be or be not fraudulent depends on another queſtion whether the goods be or be not delivered with the inſtrument that profeſſes to convey them. A conveyance of goods, without deed, is fraudulent unleſs poſſeſſion of the goods be given: if it be by deed, it is fraudulent and an act of bankruptcy. But in this caſe no other poſſeſſion could have been given. When the bill of ſale was executed the goods remained on the premiſes of the Canal Company to whom the conveyance was made. It has been admitted in many caſes that there need not be a tranſmutation from hand to hand; where goods are in a warehouſe, the delivery of the key of the warehouſe has been held ſufficient; and yet ſuch a conveyance may be as ſecret as the preſent. It is ſtated in the award that *Langwith* could not derive any falſe credit from the ſuppoſed poſſeſſion of theſe goods, becauſe they appeared from the ſituation in which they were placed to belong to the Company on whoſe ground they were lying. Then not knowing what other delivery of the goods there could have been, I am bound to ſay that the poſſeſſion depended on the property of the goods. This appears to have been a fair tranſaction; the goods were bought with the money of the Company and were intended for their uſe. This is not like *Twine*'s caſe that has been referred to; that was a caſe of great fraud. I am therefore of opinion that the honeſty of the caſe falls in with the law of the caſe, and that the deciſion of the arbitrator was perfectly right.

Ashhurst, J. The only queſtion is whether poſſeſſion of the goods were or were not given to the Canal Company when the bill of ſale was made, and I think it was. The goods were before

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before lying on the premiſes of the Company, and there could have been no other delivery of the goods; it would have been abſurd to have removed the goods from the place where they were lying, ſince they muſt have been afterwards brought back to the very ſame ſpot in order to be uſed.

GROSE, J. It has been contended that this deed was an act of bankruptcy on the ground that it was fraudulent. But it was not fraudulent as far as reſpected *Langwith*'s other creditors; it was for their benefit, for the Canal Company in conſideration of the bill of ſale were to advance him more money in order to enable him to pay his other creditors, and to carry on his buſineſs. Nor was the deed fraudulent as far as reſpected the Canal Company. Then it was ſaid that the tranſaction was fraudulent becauſe the poſſeſſion of the goods was not changed, and *Twine*'s caſe was cited to prove it: but the circumſtances of that caſe differ from thoſe in the preſent; and it muſt be remembered that in that caſe the not transferring the poſſeſſion was only ſaid to be a badge of fraud, and not neceſſarily fraudulent in itſelf. Then we muſt take all the circumſtances of the caſe into conſideration, and ſee whether it be or be not fraudulent: but I am of opinion that the queſtion of fraud was for the conſideration of the jury; and the duty of the jury in this caſe devolved on the arbitrator, who has determined that there was no fraud in the caſe. I agree with the determination in *Edwards* v. *Harben*, though even there the caſe of *Bucknal* v. *Roiſton* was mentioned by Mr. J. *Buller*, in which it was held that the want of poſſeſſion did not make the bill of ſale fraudulent, it being conſiſtent with the deed. But in this caſe I think that poſſeſſion of the goods was delivered to the Company as far as poſſeſſion under theſe circumſtances could be given; and that there was no fraud in the tranſaction.

LAWRENCE, J. *Twine*'s caſe, on the authority of which it has been contended that this deed was fraudulent, is very diſtinguiſhable from the preſent. There the debtor, in order to defeat an execution ſued out by one of his creditors, executed a bill of ſale of ſome goods to another; and the vendee, though a creditor, ſuffered him to continue in poſſeſſion of the goods; he appeared to the world and acted as the owner of the goods, and indeed ſold ſome of them afterwards, though the profeſſed object of the bill of ſale was to make an abſolute transfer of the goods to the vendee. But it has been ſaid that in this caſe the bankrupt muſt be conſidered by the world as the owner of theſe goods after the bill of ſale, becauſe the goods remained where they were before, and no poſſeſſion of the goods was delivered to the Canal Company. I agree that if the poſſeſſion of the goods by the Company did not accompany the bill of ſale, this would have fallen within thoſe caſes where the want of poſſeſſion was deemed a badge of fraud: but what was the poſſeſſion of the bankrupt himſelf before the bill of ſale? The goods were then apparently in the poſſeſſion of the Company, becauſe they were lying on their banks; the bankrupt had no poſſeſſion of the goods otherwiſe than becauſe he had the property in them: but when he transferred that property to the Company, the law referred the poſſeſſion to the Company who had the property, and in whom the ſole poſſeſſion apparently was before; and conſequently no falſe credit in the bankrupt was held out to the world. I am therefore of opinion that this deed was not fraudulent.

Rule diſcharged.

PEDLEY *againſt* GODDARD.

Friday, Nov. 25th.

Upon an application for an attachment for non-performance of an award, the ſubmiſſion to which was made a rule of court by virtue of the 9 & 10 *W.* 3. *c.* 15. it is competent to the parties to object to the award for any illegality apparent upon the face of it, altho' the time limited by that ſtatute for applying to the Court to ſet aſide the award is expired. An award that the defendant ſhall pay to the plaintiff ſuch a ſum of money unleſs within 21 days (which in fact was after the time limited for making the award) the defendant ſhall exonerate himſelf by affidavit from certain payments and receipts, in which caſe he was only to pay a certain other leſs ſum, is illegal and void, being uncertain and inconcluſive.

TWO rules had been obtained, the one for an attachment againſt the defendant for not performing an award made the 5th of *November* 1795 under arbitration bonds, the ſubmiſſion to which had been made a rule of Court. The other, a croſs motion made in laſt *Trinity* term to ſet aſide the attachment, on the ground that the award was bad on the face of it, it not being final. The arbitrators awarded that there was due from the defendant to the plaintiff 147 *l.* 3 *s.* 3 *d.* (in caſe the ſum of 25 *l.* 11 *s.* therein aftermentioned was paid to the defendant,) over and above the dividends therein after ſet forth; and that the defendant ſhould pay that ſum to the plaintiff on or before the 14th of *December* 1795. The award then ſet forth that doubts had ariſen in the minds of the arbitrators whether the ſum of 25 *l.* 11 *s.* for which a bill of exchange dated in *February* 1792 was drawn at the inſtance of the plaintiff on one *A. Carew*, payable to the defendant on demand, had ever been paid to the defendant; and alſo whether any dividends over and above the ſum of 12 *l.* had been received by the defendant for the uſe of the plaintiff in reſpect of a certain other

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bill of exchange for 49 *l.* either drawn accepted or indorſed by one *Elliot.* Then the arbitrators awarded that the defendant ſhould within twenty-one days from the date of the award by an affidavit declare on oath what ſum had been received by him or for his uſe by virtue of the bill ſo drawn on *A. Carew*; and if the whole or any part of the ſum of 25 *l.* 11 *s.* had not been paid, they awarded and authoriſed the defendant to deduct from the 147 *l.* 3 *s.* 3 *d.* ſo much of the ſum of 25 *l.* 11 *s.* as ſhould appear by the affidavit not to have been received. And further, in caſe it ſhould within twenty-one days from the date of the award be made to appear by an affidavit to be made by any perſon whomſoever that any further dividend or ſum over and above the ſum of 12 *l.* had been paid by any perſon to the defendant or for his uſe, in reſpect of the bill of exchange for 49 *l.*, then they awarded that the defendant ſhould on or before the ſaid 14th *December* 1795 pay to the plaintiff ſuch further ſum over and above the ſaid 12 *l.* as ſhould be ſo proved to have been received, *&c.*

Holroyd ſhewed cauſe (*a*) againſt the rule for iſſuing the attachment, and argued in ſupport of the rule for ſetting aſide the award. The application for the attachment is grounded on the 9 *&* 10 *W.* 3. *c.* 15. which directs that a ſubmiſſion to arbitration may be made a rule of court, and that for non-performance of the award the party ſhall be ſubject to all the penalties of contemning a rule of court, with this proviſo that any arbitration procured *by corruption* or *undue means* may be ſet aſide, *ſo as* complaint be made to the court before the laſt day of the next term after ſuch arbitration made and publiſhed. This, it is contended, precludes the defendant from making any objection to the award after that period. But the meaning of the act was only to confine the party complaining to move within the time limited to ſet aſide an award for any matter dehors the award; becauſe where the objection ariſes on extrinſic circumſtances, evidence of the facts might be loſt if not brought forwards recently after the occaſion, and therefore it was proper that the time ſhould in that reſpect be limited. But there is no danger of leaving the time unlimited where the objection appears on the face of the award; nor was there any reaſon why the Legiſlature ſhould in that caſe put the party to the expence of applying to ſet it aſide. It is clear that if an action were brought on an illegal award, the defendant might object to it on that ground notwithſtanding the act; and if ſo it would be abſurd and inconſiſtent to ſuppoſe that

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(*a*) This caſe was ſeveral times before the Court; it was firſt mentioned in the laſt term.

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the Legiſlature meant that the Court ſhould enforce that in a ſummary way which they are bound to reſiſt in the regular courſe of juſtice; and therefore by neceſſary conſtruction, when the Court are called upon to enforce an award, it is competent to the party to ſhew that it is an illegal one, and ought not to be enforced. Beſides an attachment only iſſues for a contempt; and the Court will never conſider a party in contempt for not performing an award which on the face of it is illegal and void. The only method of enforcing an award before the ſtatute of *William* was by action; and the ſtatute only meant to give a ſummary remedy in lieu of the former more circuitous one, but not to legalize a bad award; but in the inſtances of an award being procured by corruption or undue means, for the reaſons alluded to they thought proper to require that the objection ſhould be made within a certain time. There is indeed a caſe of *Dubois* v. *Medlycott* (*a*), where the Court are ſuppoſed to have ſaid that an objection to the award cannot be made after the firſt term: but non conſtat that there the objection appeared on the face of the award. And beſides that was in *Eaſter* 10 *Geo.* 2.; and in *Stephenſon* v. *Browning* (*b*), *E.* 12 *Geo.* 2., the Court expreſsly ſaid that "objections appearing upon the face of "the award may be made at any time; but that where the "party complains of corruption or ill practice he muſt do it within "the time limited." In *Hutchins* v. *Hutchins* (*c*), *Lee* C. J. ſaid that he remembered this diſtinction to be made by Mr. Juſtice *Powell*; "That the Court will not ſet aſide an award "for defects appearing on the face of it; but this is a good "reaſon againſt granting an attachment for refuſing to perform it." And in *Holland* v. *Brookes* (*d*), the ſame diſtinction was taken. He then proceeded to ſhew, 2dly, that the preſent award was bad on the face of it, it not being concluſive between the parties, but depending on a future examination and future acts of one of them; and becauſe alſo thoſe acts were not to be done until after the expiration of the time limited by the bonds for the ultimate deciſion of the arbitrators (*e*).

B. Morice contrà. As to the argument that the act of *Wm.* only meant to preclude objections to the award after the time limited in the two excepted caſes of corruption or undue means, that would

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(*a*) *Barnes* 55. 4to. ed.

(*b*) *Ib.* 56. (*c*) *Andr.* 297.

(*d*) *Ante*, 6 vol. 161.

(*e*) By the arbitration bonds the award was to be made on or before the 6th *Nov.* 1795: It was in fact made on the 5th, and the defendant was allowed 21 days after to make the affidavit required.

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be to defeat the whole policy of the act, which was to give effect to awards and render them concluſive between the parties to prevent further litigation; and therefore it only permitted objections to be made on thoſe two grounds within a limited time; whereas the conſtruction contended for would let in more exceptions than it excluded. What is ſuppoſed to be ſaid in the caſe of *Stephenſon* v. *Browning* (*a*) is extrajudicial, and has no reference to the caſe then before the Court: It is a diſtinct note of the Reporter's at the end of the caſe. But in the preceding page the very point was in judgment; and there the Court held that an objection in point of law to the award could not be taken after the time limited. The queſtion did not ariſe in *Holland* v. *Brookes* (*b*); for there it was only determined that an award could not be impeached for defects not appearing upon the face of it on a motion for an attachment. But it is ſaid that as this could not be enforced by action, the Court will not enforce it in this manner. But that is begging the queſtion; for the ſtatute of *William* operates as a ſtatute of limitations, and precludes all objections to an award in any ſhape unleſs made within the time ſpecified. So if a writ of error be not brought within due time (*c*) to reverſe an erroneous judgment, the Courts are bound to give effect to the judgment afterwards, however erroneous it may appear to be on the face of the record; and yet the ſame argument might be applied there as in this caſe. But, 2dly, this award is good on the face of it. It is true that all awards muſt be certain and final. But Lord *Manſfield* ſaid in *Hawkins* v. *Colclough* (*d*), that the certainty was to be judged of according to a common intent, and conſiſtent with a fair and probable preſumption. Now here the award is final; for there is nothing further left for the judgment of the arbitrators: and it is certain to a common intent; becauſe it is capable of being reduced to a certainty within twenty-one days. For it awards that a certain ſum is due if a particular bill has been paid and certain dividends received; and it points out the method of aſcertaining thoſe facts within a given period, and what ſhall be received or deducted according to the event. The maxim therefore applies, id certum eſt quod certum reddi poteſt. An award to pay a certain ſum, and give ſuch a bond as counſel ſhould adviſe as a ſecurity, is good. 1 *Rol. Abr.* 250. *pl.* 5. In *Winch* v. *Sanders* (*e*), it is ſaid that an arbi-

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(*a*) *Barnes* 56.

(*b*) *Ante*, 6 vol. 161.

(*c*) Twenty years; but that is by the ſtat. 10 & 11 *W.* 3. *c.* 14.

(*d*) 1 *Burr.* 277.

(*e*) *Cro. Jac.* 584.

trator cannot award ſo much to be paid, and afterwards that if before the laſt payment it ſhall appear to him that ſuch a ſum was due from the payee, he ſhould repay it to the other, becauſe that is reſerving ſomething for his own future judgment. But if it had been *that if the payee had ſhewn any bill of debt to ſuch a ſum, that this ſum certain ſhould be repaid*, peradventure that had been good enough. So an award that the defendant ſhould pay the plaintiff the charge of a ſuit then depending, and that the plaintiff ſhould give the defendant a bill of charges was held good; 3 *Lev.* 18., though ſomething remained there to be done by one of the parties. All theſe caſes proceeded on the ground that the arbitrator did not reſerve any thing for *his* future conſideration; and as that was not the caſe here, this award may alſo be ſuſtained.

Lord Kenyon, Ch. J. With regard to the laſt point, I do not think that the award is final. The caſe that moſt reſembles this is that cited from 3 *Lev.* 18: but that is like the common caſe of leaving coſts to be taxed by the officer of the court, which does not vitiate the award. But here the arbitrators, inſtead of determining the points in diſpute between theſe parties, have left one ſum in diſpute to be decided by the perſon who of all others was the leaſt qualified to decide, the defendant himſelf.

But the firſt point is one of the moſt important queſtions that has been agitated ſince I have had a ſeat in this court. There appear to be dicta both ways. In *Freame* v. *Pinneger* (*a*) Lord *Mansfield* ſaid "that where no objection is made to an award within the time limited by the ſtatute, the other ſide may apply for an attachment to enforce the performance of the award." Now that is very correct when applied to the caſe then in judgment: but it was not meant as a general rule; or if it were, I think that it was extrajudicial, and we are not bound by it. I am afraid however that I was miſled by this on a former occaſion (*b*), when I thought that an attachment for non-performance of an award ought to be granted ex debito juſtitiæ, unleſs a motion to ſet aſide the award were made within the time limited by the ſtatute. But on looking into the act of parliament and the caſes that have been cited, I think that that opinion was haſtily formed. This is an authority given by the Legiſlature to the Court to be exerciſed in a ſummary way; the act directs that in caſe of diſobedience to an award made under

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(*a*) *Cowp.* 24. (*b*) When this caſe came before the Court the firſt time.

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the ſtatute, the party neglecting or refuſing to execute the ſame ſhall be ſubject to all the penalties of contemning a rule of court, &c., unleſs the award be procured by corruption or other undue means; in which caſe, the ſecond ſection ſays the arbitration ſhall be judged and eſteemed void; ſo as complaint of ſuch corruption or undue practice be made in the court, &c, before the laſt day of the next term after ſuch arbitration made &c. When a party therefore wiſhes to ſet aſide an award on account of extrinſic circumſtances, it is proper that the application ſhould be made to the Court recently after the award is made and while the facts are in the memory of the parties concerned: But when the award is bad on the face of it, it carries with it thoſe circumſtances which go to its deſtruction; and in that caſe it ſeems reaſonable that the objection may be taken to the award at any time whenever the adverſe party endeavours to enforce it; and certainly this is the caſe when the attempt to enforce the award is by action. However this does not depend on reaſon or on the good ſenſe of the thing alone; for it is ſupported by great authorities. In the caſe cited from *Andr.* 297. the Court ſaid that "an award could not be ſet aſide, unleſs it be for fraud or corruption in the arbitrators, becauſe to theſe caſes only the ſtatute extends." And *Lee*, Ch. J. added, "that he remembered this diſtinction to be made by Mr. *J. Powell*, that the Court will not ſet aſide an award for defects appearing on the face of it; but this is a good reaſon againſt granting an attachment for refuſing to perform it." Some of the other caſes that were cited are alſo to the ſame purpoſe. Therefore after the beſt conſideration that I can give the ſubject, and I have frequently turned it in my mind ſince the caſe firſt came before the court, I am of opinion that the ſound conſtruction of the act of parliament is, that if a motion be made to ſet aſide an award for extrinſic matter, it muſt be made within the time limited by the act, namely, before the end of the next term: but that an application for an attachment for not performing an award may be reſiſted at any time for defects appearing on the face of the award itſelf.

ASHHURST, J. I confeſs I have always underſtood the diſtinction to be that which my Lord has adopted; and I think it has been ſeveral times laid down in this court ſince I have been here. When either party moves to ſet aſide an award for matter dehors the award, the motion muſt be made within the time preſcribed by the ſtatute: but where the defect is apparent on the award, the objection to it may be taken at any time when the Court are called upon to enforce it; for it would ill become the dignity of a court of juſtice to enforce by attachment, as for a contempt of the court, an inſtrument which on the face of it appears to be an illegal inſtrument. This ſeems to be a ſenſible diſtinction, independently of the authorities: but the authorities alſo ſeem to eſtabliſh it.

GROSE, J. Two different things are prayed by theſe rules; one that the award may be ſet aſide; the other that an attachment may be granted. With regard to the firſt, as this was a ſubmiſſion to arbitration under the ſtatute, every thing that is to be done either for the purpoſe of enforcing or ſetting aſide the award muſt be done under the powers given by the ſtatute. Now on looking into the act it appears that the Court have no juriſdiction to ſet aſide the award; the words being clear and explicit, that ſuch an application muſt be made before the end of the term next after the award is made. But that is no reaſon why we ſhould grant an attachment for not performing the award if it be bad on the face of it. If the party has a right to enforce the award, he may bring his action, and then the adverſe party may take advantage of any objections appearing on the award by pleading or demurring; and either party may carry the record to another tribunal by writ of error. I do not think that this award is final for the reaſons already given: but even if it be doubtful whether the award be or be not good, we ought not to grant an attachment. The diſtinction in *Hutchins* v. *Hutchins* is applicable to both theſe rules; we will not ſet aſide this award, nor will we grant an attachment for refuſing to perform it.

LAWRENCE, J. If we grant an attachment, we deprive the party objecting to it of all opportunity of diſcuſſing it's legality hereafter; the attachment would be concluſive: whereas if we leave the party, who wiſhes to enforce the award, to bring his action, the legality of the award may be queſtioned in a ſuperior court on a writ of error. Since the caſe was firſt mentioned, I have looked into the ſeveral authorities in order to ſee whether the legality of an award may be queſtioned on a rule for an attachment for not performing it; and I think that the caſe in *Andrews* decides that it may, for objections appearing on the award itſelf. In many caſes the Court have refuſed to enquire into the award after the time limited by the act, where the award appeared to be good on the face of it: but I find no caſe contrary to that in *Andrews*, which ſeems to mark out the true line of diſtinction.

Per Curiam, Both rules diſcharged.

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Saturday, Nov. 26th.

TETHERINGTON and another *againſt* GOLDING.

It is irregular to hold a defendant to bail in aſſumpſit and then to declare in trover. A plaintiff cannot declare by the bye before he has declared in chief.

THE plaintiffs, having held the defendant to bail on an affidavit in aſſumpſit, delivered a declaration in trover; whereupon *Gibbs* obtained a rule calling on the plaintiffs to ſhew cauſe why an exoneretur ſhould not be entered on the bail-piece.

Law now ſhewed cauſe againſt the rule; and admitted that if this were a declaration in chief it would be irregular, but ſaid that this might be conſidered as a declaration by the bye, and that as the plaintiffs might declare in chief within two terms (which were not yet elapſed) they might now declare in trover, and then there would be no irregularity.

Sed per Curiam: The proceedings are irregular. The declaration in trover is not a declaration by the bye; and if it were, it would be irregular, becauſe ſuch a declaration cannot be delivered before a declaration in chief (*a*).

Rule abſolute.

(*a*) Vid. *Delves q. t.* v. *Strange, ante,* 6 vol. 158.

Saturday, Nov. 26th.

The KING *againſt* R. CARPENTER SMITH.

The Court will grant a rule niſi for a criminal information at the end of a term againſt a magiſtrate for malpractices *during the term*; but not for any miſconduct before the term.

ERSKINE moved for a criminal information againſt the defendant for a neglect of duty as a magiſtrate of *Surry* on the 23d inſtant.

Lord KENYON, Ch. J. expreſſed a doubt whether it was not contrary to the practice of the Court to grant an information *againſt a magiſtrate* ſo late in the term that he could not ſhew cauſe againſt it during the term, and whether the application ſhould not be deferred until the next term: but the officers of the court certifying that ſuch a motion as the preſent might be made at the end of a term for ſuppoſed miſconduct *during the term*, and that the practice alluded to only applied to caſes where the fact complained of happened before the commencement of the term,

A rule to ſhew cauſe was accordingly granted.

But a ſimilar motion was immediately afterwards refuſed in *R.* v. *Beavis* and two others juſtices of the peace in *Devonſhire*, for ſuppoſed malpractices on the 4th of *July* laſt.

The KING *againſt* The Juſtices of STAFFORDSHIRE.

Monday, Nov. 28th.

Under the ſtat. 13 *G.* 3. *c.* 78. *ſ.* 19, power is given to the party grieved to appeal againſt an order &c of juſtices for turning a road to the next Seſſions, he giving ten days notice of appeal before the Seſſions, if there be time, if not to appeal to the following Seſſions on giving the like notice. If therefore the appellant has no notice of the proceeding of the juſtices ten days before the Seſſions, he cannot appeal to thoſe Seſſions, but muſt wait till the following Seſſions. A perſon is not bound to take notice of the turning of a road from the act of it's being turned. *Semo.*

LEYCESTER had obtained a rule, calling on the defendants to ſhew cauſe why a mandamus ſhould not iſſue, commanding them to receive an appeal, as of the laſt Seſſions, againſt an order of two magiſtrates for turning a road, under the ſtat. 13 *G.* 3. *c.* 78. *ſ.* 19., which enables two magiſtrates in certain caſes by an order to divert turn and ſtop up highways, giving an appeal to any perſon aggrieved by ſuch order or proceeding or by the incloſure of any road or highway to the next Quarter Seſſions *on giving ten days notice* in writing of ſuch appeal to the ſurveyor and party intereſted in ſuch incloſure if there be ſufficient time for that purpoſe; if not, "ſuch appeal to be made upon the like notice to the next Quarter Seſſions." The order for turning the road in queſtion, which had been made three weeks before the laſt *Michaelmas* Seſſions, was returned to thoſe Seſſions, in order that it might be confirmed (*a*) on the 6th of *October*: on the next day, during the ſame Seſſions, the appellant moved to enter his appeal againſt it, ſaying that he had had no notice of the order before the Seſſions, and therefore had not given the ten days notice of appeal required by the ſtatute: but the Seſſions refuſed to receive the appeal.

Perceval now ſhewed cauſe againſt the rule. In whatever point of view this queſtion is conſidered, there was no ground to receive the appeal at the laſt Seſſions, and conſequently the rule for the mandamus muſt be diſcharged. Either the appellant had or had not notice of the proceeding of which he complains ten days before the laſt Seſſions. If he had (and he was bound to take notice from the time when the old road was ſtopped up, it being an act of notoriety,) he ought to have given notice of appeal ten days before the laſt Seſſions; and not having done ſo the Seſſions were not bound to receive his appeal. If he were not bound to take notice of the order and of the turning of the road from the actual turning of it, and had no other notice of the proceeding before the laſt Seſſions, he may under the power given by the act appeal to the next Seſſions, on giving the notice required by the act. But in no inſtance are the Seſſions bound to receive an appeal unleſs the appellant has given ten days notice of appeal.

Per Curiam. This application for a mandamus is founded on a ſuppoſition that the juſtices at the laſt Seſſions were guilty of

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(*a*) This was now admitted to be a nugatory act.

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negligence in not receiving the appeal: but the appellant, not having given ten days notice of appeal before the laſt Seſſions, had no right to appeal. And he will not be prejudiced by this rule being diſcharged; becauſe if he had no notice of this proceeding until the laſt Seſſions, the juſtices at the next Seſſions will be bound to receive his appeal then on his giving the notice required by the ſtatute.

Rule diſcharged.

REGULA GENERALIS.

IT is Ordered, That, in all caſes where a rule is obtained to ſhew cauſe why proceedings ſhould not be ſet aſide for irregularity with coſts, and ſuch rule is afterwards diſcharged generally, without any ſpecial direction upon the matter of coſts, it is underſtood to be diſcharged with coſts; and the latter rule muſt be drawn up accordingly.

REGULA GENERALIS.

IT is Ordered, That notwithſtanding the general rule (*a*) made by this Court in *Eaſter* term 30 *Geo.* 3. if any priſoner in the King's Bench Priſon ſhall hereafter ſtate by affidavit any ſpecial cauſe to the ſatisfaction of this Court for having an additional day-rule or day-rules beyond thoſe allowed by the aforeſaid rule, ſuch additional rule or rules ſhall be granted accordingly for any day or days enſuing ſuch application.

(*a*) *Ante*, 3 *vol.* 584.

REGULA GENERALIS.

IT is Ordered, That from and after the firſt day of next term, upon every affidavit ſworn in this court or before any Judge or commiſſioner thereof, and made by two or more deponents, the names of the ſeveral perſons making ſuch affidavit ſhall be written in the jurat; and that no affidavit be read or made uſe of in any matter depending in this court, in the jurat of which there ſhall be any interlineation or eraſure.

THE END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

Doe on the Demiſe of T. MARTIN and JONES *againſt* WATTS.

Thurſday, Jan. 26th.

If a tenant for life, under a limited power of leaſing, grant a leaſe exceeding his power, the leaſe is void, and not capable of confirmation by the remainder-man.—But if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admiſſion that the defendant *is his tenant*, and then he is entitled to notice to quit.

THIS was an ejectment to recover ſome premiſes in *Bermondſey* in the county of *Surry*. On the trial it appeared that *J. Martin* deceaſed, who was tenant for life under a ſettlement, with remainder in tail to *T. Martin* one of the leſſors of the plaintiff, had a power of leaſing the premiſes in queſtion for twenty-one years in poſſeſſion, without fine, and at the beſt rent; and that in 1779 he granted a leaſe to *Stubbs*, under whom the defendant claimed, for twenty-one years, at the annual rent of 36 *l.*; the premiſes being then worth 60 *l. per annum.* That *J. Martin* received the rent during his lifetime. That after his death, which happened *June* 4th 1794, *Lane*, who was authoriſed by *T. Martin* to receive rent for him, received rent of the defendant for him, and paid part of it to the executors of *J. Martin* and the reſt to *T. Martin*. It was objected, on the part of the defendant, that, admitting the leaſe in 1779 to be void,

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void, the receipt of rent from the defendant by *T. Martin* created a tenancy from year to year, and that the plaintiff could not recover, not having given the defendant notice to quit. Mr. Baron *Hotham*, who tried the cauſe, being of that opinion, nonſuited the plaintiff, with liberty for him to move to ſet aſide the nonſuit without coſts, if this Court ſhould be of opinion that no notice was neceſſary.

A rule having been accordingly obtained for that purpoſe in the laſt term,

Garrow and *Marryat* were now to have ſhewn cauſe againſt it. But

Shepherd Serjt. and *Conſt*, contrà, were deſired to begin.

It may be admitted that if *T. Martin*, one of the leſſors of the plaintiff, knowing his real ſituation, and that the leaſe was void, had nevertheleſs accepted rent from the defendant, it would have amounted to an acknowledgement by him that the defendant was his tenant, and conſequently that he could not have turned him out of poſſeſſion, without giving him notice to quit: but that admiſſion will not aſſiſt the defendant in this caſe; becauſe here, ſo far from *T. Martin* treating the leaſe as a nullity when he firſt became entitled to the eſtate, he was ignorant of his real ſituation, and acted under a miſtake in ſuppoſing that the leaſe was a valid one. Here the leaſe was void in it's creation, the tenant for life having exceeded his authority in granting it; and no acceptance of rent by the remainder-man could confirm it. *Jenkins* d. *Yate* v. *Church*, *Cowp.* 482; *Doe* d. *Simpſon* v. *Butcher*, *Dougl.* 50; and *Ludford* v. *Barber*, *ante*, 1 *vol.* 94; in which laſt caſe Lord *Manſfield* ſaid, "The leaſe is ſo far void that the plaintiff need not have given notice in ejectment againſt the defendant." But though the leaſe were void and not capable of confirmation by the remainder-man accepting rent, it appears that the latter received the rent under a miſtaken notion that it was due under the leaſe; and conſequently no other agreement between the parties can be implied. This preciſe queſtion aroſe in *Goodtitle* d. *Adeane* v. *Prentice*, executor of *Mitchell*, at the Lent Aſſizes in *Surry* 1790, the facts of which caſe were ſhortly theſe; Mr. *Compton*, the huſband of Mrs. *Compton* who was ſeiſed of the premiſes, being copyhold, without his wife's conſent in 1780 granted a leaſe to the defendant for forty-one years, at a ſmall rent; the huſband received the rent until his death in 1788, and afterwards the daughter, the leſſor of the plaintiff (the wife having died in the huſband's life-time) received rent to *Lady-day* 1789, not knowing of the invalidity of the leaſe; and there Mr. Juſtice *Gould*, who tried the cauſe, ruled that no notice was neceſſary.

Lord **Kenyon**, Ch. J. I admit all the caſes that have been cited, except the laſt at Niſi Prius: they only prove, what indeed is admitted by the counſel for the plaintiff in this caſe, that a leaſe made by a tenant for life, which is void in it's creation, cannot be confirmed by the reverſioner: but they do not ſhew that when ſuch a leaſe is abandoned another relation may not ſubſiſt between landlord and tenant, by the one paying and the other receiving rent. Here one of the leſſors of the plaintiff received rent by his ſteward eo nomine *as rent*: if the defendant had been a treſpaſſer no rent could have become due; it could only be paid as rent under the idea that the defendant was a tenant; and if he were a tenant the plaintiff cannot recover, not having given him notice to quit. It would be extremely unjuſt that a tenant who occupies land ſhould, after he has ſown it, be turned out of poſſeſſion by an ejectment without any notice. And it was in order to avoid ſo unjuſt a meaſure that ſo long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of poſſeſſion without reaſonable notice to quit (*a*). That rule has always prevailed ſince; and in times certainly as enlightened as thoſe we ought not to depart from a rule which was ſo wiſely and juſtly ſettled. Therefore I am clearly of opinion, on the authority of all the caſes that have been decided, (except that at Niſi Prius, which perhaps paſſed without much conſideration, and cannot be put in the balance againſt all the other deciſions,) and on the juſtice and convenience of the caſe, that this rule muſt be diſcharged.

Ashhurst, J. It is clear that the leaſe which was void could not be confirmed by the reverſioner. It is alſo clear that the reverſioner received rent, as rent, after his title accrued; and by accepting the rent he acknowledged the defendant to be his tenant from year to year.

Grose, J. The queſtion is, whether there was or was not any evidence of a tenancy between one of the leſſors of the plaintiff and the defendant. It being admitted that the leaſe was void, the defendant was not tenant under that leaſe. But the plaintiff received

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(*a*) Vid. 13 *Hen.* 8. 15. *b*.

received rent of the defendant; and from that moment he admitted that the defendant was a tenant to him of ſome kind; and no other tenancy appearing here, the defendant muſt be conſidered as tenant from year to year. The conſequence of a contrary deciſion would be that, though the defendant had continued to occupy this eſtate for twenty years, without any other leaſe, the plaintiff might equally have denied that the defendant was his tenant.

Lawrence, J. If the defendant were not a tenant, he muſt have been a treſpaſſer, and ſo he muſt have continued if he had remained on the premiſes for any number of years: but the plaintiff has by his own act admitted the defendant to be his tenant, and cannot therefore now conſider him as a treſpaſſer. It has been ſaid however that the plaintiff was ignorant of his title when he received this rent: but he was bound to know his own title; and he cannot be permitted to avail himſelf of his ignorance to the prejudice of the defendant, and to ſay that, becauſe he did not examine his own title, he may conſider the defendant as a treſpaſſer and turn him out of poſſeſſion without notice. And if this is to be determined on the reaſon of the thing, it is much more reaſonable that the plaintiff, who ought to have looked into his title, ſhould be bound by his own act, than that the defendant ſhould be turned out of poſſeſſion without any notice, merely on account of the ſuppoſed ignorance of the plaintiff.

Rule diſcharged.

Wedneſday, Jan. 25th.

Knight *againſt* Halsey.

See Journ. Dom. Proc. 19. June 1800.

By law hops are titheable after they are gathered from the bind: and it ſeems that a cuſtom to ſet out the tithe of them by the tenth hill, where the rows are unequal, leaving the binds uncut and the poles ſtanding, cannot be ſupported.

This was an action by the plaintiff as the occupier of a certain cloſe in the pariſh and rectory of *Farnham* againſt the defendant, the farmer of the tithe of hops within the ſame, for not taking away the tithe which was duly ſet out by the plaintiff. The ſecond count ſtated that the plaintiff ſet out the tithe according to the uſage and manner of tithing hops there. The plaintiff's witneſſes proved at the trial that when the rows of hops were unequal, as they were in the preſent inſtance, the tithe, as far back as living memory reached, had been ſet out in this pariſh (except where a compoſition had been paid, which in general had been the caſe,) by the tenth hill, the binds being left uncut and the poles ſtanding; and the relation of ſeveral old people now dead was given in evidence to that effect. That according to that rule the tithes had been ſet out in the inſtance in queſtion, and even with peculiar advantage to the defendant in the manner of doing it. And that proper notice had been given to the defendant, who had neglected to take the tithe away.

In addition to this were read copies of the proceedings in a cauſe of *Chitty* v. *Reeves* in the court of Exchequer, with the decree thereon. From theſe it appeared that a bill was filed in *Michaelmas* term 1686 by *Ann Chitty*, the widow and executrix of *C. Chitty*, againſt *W. Reeves* an occupier within the abovementioned pariſh of *Farnham*, praying an account againſt him for not having ſet out the tithe of his hops according to the cuſtom, which was therein alleged to be that the occupier ſhould ſet out *every tenth row or hill of hops without any fraud, and as they ariſe, before the ſame are gathered, or the binds thereof cut:* and the defendant by his anſwer admitted the cuſtom to be to ſet out every tenth hill, but alleged that the cuſtom alſo was for the occupier to cut the tithe hills at the ſame time with his own, and to ſtrip the binds and hops from off the poles, and lay them upon ſuch tenth hill, from whence the farmer was to remove them in a convenient time, and pick them elſewhere. The anſwers of certain witneſſes to interrogatories touching the manner and uſage of taking the tithe were alſo read; ſome of them ſtated it to be to ſet out the tenth row, and if there were any odd hills, then the ſame were to be ſet out by every tenth hill; others ſtated it to be the tenth row, and where the rows were not equal by the tenth hill; all agreed that the binds were to be left uncut, and that the impropriator afterwards cut gathered and picked the hops on the land within a convenient time. The final decree was given in *Tr.* 1687; wherein it is ſtated that, "it fully appearing to "the Court that the cuſtom uſage or practice of paying tithe "hops in the pariſh of *Farnham* in the county of *Surry* for "above ſixty years paſt hath been that the impropriator or "his leſſee hath had for their tithe the tenth row when equal, "or elſe the tenth hill; that the ſame have been left ſtanding "with the hop binds uncut, and that the impropriators, &c, have "always had convenient time to come and cut the ſaid binds "and pick the hops upon the grounds; and it further appear-

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"ing to the Court that if the owners of the hops ſhould "take down the poles and cut the binds of the ſaid tithe hops "when they cut their own, the tithe of hops would be much "prejudiced and made worth little or nothing, it being the "nature of hops to be ſpoiled if they lie twenty-four hours "on the ground before they are picked, and it being impoſſible "for the impropriators, &c. to have perſons to pick the tithe "hops of the whole pariſh, who generally pick together, "and have very great quantities, before they are ſpoiled, in "caſe the pariſhioners ſhould cut the binds of the tithe hops "when they cut the other nine parts; *which cuſtom uſage "and practice the Court declares to be reaſonable and fitting "to be obſerved;* and in caſe there was not any ſuch uſage, "the Court being of opinion and ſo declaring that tithe hops "ought to be paid in kind, *viz.* the tenth part of the whole "after picking." The decree then proceeded to enjoin the defendant to account, he not having ſet out his tithe according to the uſage. The defendant in the preſent caſe called no witneſſes, and the jury gave a verdict for the plaintiff with 1*s.* damages; adding that they thought themſelves bound by the evidence to find for the plaintiff, but that they could not approve of the mode of tithing by every tenth hill.

A rule was obtained in the laſt term calling on the plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had; againſt which

Shepherd, Serjt., *Adam*, *Lawes*, and *Barrow*, now ſhewed cauſe. The legality of the verdict is queſtioned on the ground that hops having been introduced into cultivation in this country long ſince the time of legal memory, there can be no legal commencement of the cuſtom ſet up by the plaintiff. It is uncertain when hops were firſt introduced; ſome books ſay in the time of Queen *Elizabeth;* but that muſt be a miſtake, for the *St.* 5 & 6 *Ed.* 6. *c.* 5., takes notice of the hop as a plant then in cultivation; and how much earlier it was planted here does not appear. But admitting it to have been then recently brought into uſe, as ſome of the caſes ſeem to intimate (*a*), yet that being before the reſtraining and diſabling ſtatutes of the 1ſt and 13th of *Eliz.*, the cuſtom which has ſo long prevailed in this pariſh may have taken it's riſe from a real compoſition, of which no other evidence can

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(*a*) Vid. *Bunb.* 79. and other caſes hereafter cited.

now be given than the uſage, which is ſufficient. 2 *Pr. Wms.* 573. In *Jackſon* v. *Walker* and others (*a*), upon a queſtion whether the vicar or impropriator was entitled to the tithe of hops in fields and open places in the pariſh of *Farnham*, which the vicar claimed as ſmall tithes, Ld. Ch. B. *Skynner* obſerved that the endowment of vicarages had, in general, if not altogether, been ſince the time of legal memory; that many of them were loſt and could only be proved by uſage; and it would be unreaſonable to expect proof of a preſcriptive right. So here, the ſame ſort of evidence will ſupport the préſumption of a real compoſition; for the witneſſes who were examined in this caſe carried the uſage as far back as living teſtimony generally goes; and the other evidence of the declarations of perſons dead fills up the chaſm between that period and the caſe of *Chitty* v. *Reeves* in 1687; by the decree in that caſe the ſame uſage is ſtated to have been proved to exiſt for at leaſt ſixty years then paſt; and the exiſtence and legality of it were thereby expreſsly eſtabliſhed. And as it is admitted on all hands that hops are of novel introduction, there could not have been any particular mode of ſetting them out required by the common law; and none having been pointed out by ſtatute, it muſt reſt upon uſage alone, either ſuch as had prevailed for forty years antecedent to the *St.* 2 & 3 *Ed.* 6. *c.* 13., and thereby legalized, if the plant had been cultivated ſo long, or for any period prior to the 13th *Eliz.* and therefore referable to and evidence of a real compoſition. In the caſe of *Crouch* v. *Riſden* (*b*), a prohibition was denied upon a libel in the Eccleſiaſtical Court for the tithe of hops, upon a ſuggeſtion of a preſcriptive modus to pay ſo much in lieu of the tithe; the Court ſaying that they would take notice that hops were not of ſo ancient a growth: but here it is not claimed as a preſcriptive right to ſet them out in this manner. And it is obſervable that *Twyſden*, J., who was conſidered to be peculiarly converſant in this branch of the law, ſaid in that and in another caſe in the ſame book (*c*) that it was then a queſtion how hops ſhould be tithed, whether by the hill, the pole, or the buſhel or meaſure. The caſe of *Chitty* v. *Reeves* (*d*), which was determined afterwards, is the more to be relied on, becauſe what is now contended by the occupier to be the cuſtom was then inſiſted upon by the impropriator,

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(*a*) Exchequer, *May* 1781.

(*b*) 1 *Sid.* 443.

(*c*) *Ib.* 283.

(*d*) Ante, 87.

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impropriator, who cannot be ſuppoſed to have claimed his right in a leſs beneficial manner than he was entitled to. As to the caſe of *Richard Gee* v. *Perch*, in the Exchequer *May* 1704 (*a*), upon a bill filed againſt an occupier for not ſetting out the tithe in the pariſh of *Orpington* in *Kent*, and for an account, where the Court by their decree declared that the method inſiſted on by the defendant for ſetting out his tithe of hops by ſtripping the binds from the poles and leaving the ſame in looſe heaps before the hops are picked and gathered was not a good ſetting out of the tithe of his hops, but that the hops ought to be picked and gathered from the bind before the ſame are tithable: the only matter in judgment there with reſpect to the hops was the manner of ſetting out the tithe in that particular pariſh of *Orpington*; and ſo far the judgment of the Court is againſt the cuſtom of cutting the bind and leaving it on the ground, founded, no doubt, upon the periſhable nature of the commodity, which would ſoon decay after it was ſevered from the ground, if left there: but beyond that the decree cannot be conſidered as of any authority, being extrajudicial. The facts in the caſe of *Bliſs* v. *Chandler*, in the Exchequer *Mich.* 1720, were different from thoſe in the preſent caſe; for there the bind was cut and left on the ground for the impropriator to pick: it is true that in the decree the Court declared, according to what was ſuppoſed to have been decreed in *Chitty* v. *Reeves* (*b*), *that hops were not tithable till they were picked, and ought to be paid in kind by the buſhel, viz. every tenth buſhel of the whole after picking:* But it is evident upon referring to the decree itſelf, that that was a miſtake, and that the caſe of *Chitty* v. *Reeves* is miſreported in the note in *Bunbury* 20. Then came the caſe of *Walton* v. *Tyers* (*c*), which was ultimately decided in the Houſe of Lords

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(*a*) There was a prior caſe of *Gee*, widow, v. *Perch*, in *M.* 10 *W.* 3. where the parties in intereſt were the ſame as in the other caſe of the ſame name, *Richard Gee* being the adminiſtrator of *Gee*, widow. It was a bill by the farmer of the tithe of the rectory of *Orpington* in *Kent* againſt an occupier for not ſetting out (amongſt others) his tithe of hops: The court of Exchequer decreed that the cuſtom inſiſted on by the defendant of paying 10*s.* *per* acre for the tithe of his hops is a void cuſtom, not warranted by law, and therefore that the defendant ought to account for his tithe for the time ſpecified, according to the value of the tenth part of the hops when the ſame were pulled from the bine or ſtem, at which time the tenth part is ſeverable from the nine parts, and the tithes by law payable.—Both theſe caſes are cited from the decrees. Vid. 8 *Vin. Abr.* 585. S. C.

(*b*) The decree of *Bliſs* v. *Chandler*, from whence this was quoted at the Bar, is ſtated to be made upon reading the decree in *Chitty* v. *Reeves*, and alſo the decrees in the two before mentioned caſes of *Gee* v. *Perch*, Vid. 8 *Vin. Abr.* 585.

(*c*) 5 *Bro. P. C.* 99. 3 *Burn's Ecc. L.* 450.

in 1753, where it was held that the tithe ought to be ſet out after the hops were picked from the ſtem: there the appellant had ſet out the tithe of his hops by every tenth hill, ſevering the binds from the ſoil and leaving them on the poles; and it was held that this manner of ſetting them out was not good, but that the hops ought to be picked from the binds before they are tithable. But this was not a general declaration of the law reſpecting the manner of tithing hops, but a judgment referable to the particular caſe; for it appears by the report in *Bro. P. C.* that the general cuſtom in the pariſhes of *Mickleham* and *Dorking* where the cauſe aroſe was to ſet forth the tithe by every tenth meaſure after the hops were picked: and previous to the time when the diſpute aroſe, not only all the other occupiers but the appellant himſelf had ſet forth his tithes in that manner; and therefore he was eſtopped from inſiſting upon any other manner of ſetting out the tithes. But even if that caſe be taken as declaratory of the general rule with reſpect to tithing hops, yet it can only apply to caſes where no cuſtom exiſts of ſetting them out in a different manner, as in this caſe. Nor is there any thing unreaſonable in this cuſtom; for generally ſpeaking any thing which is of the growth of the earth is tithable as ſoon as it is ſevered from the ground; and it is only neceſſary then for the occupier to ſeparate the tenth part from the other nine parts, which is already done here by the manner of planting; and the not cutting the bind is for the benefit of the rector, becauſe of the periſhable quality of the flower, if it be not gathered ſoon after the plant is ſevered from the ground. But it would be very hard, if becauſe it had been determined that for the benefit of the rector it ſhould not be ſevered and left on the ground therefore he was entitled to derive the advantage of the whole labour of the cultivator. It is ſtated in 3 *Burn's Ecc. L.* 448. that wood when tithable is ſet out, while ſtanding, by the tenth acre pole or perch, or, when cut down, by the tenth faggot, &c. as the cuſtom has been; which ſhews that ſuch a cuſtom may be good. So graſs is only tithable after it is made into hay by cuſtom, for the tithe is due of common right as ſoon as it is ſevered and divided into graſs cocks. *Ib.* 427, 428. By 1 *Leon.* 99. it ſhould ſeem that a cuſtom to ſet out the tenth land of corn reckoning from the church, in lieu of all tithes of corn, may be good; though if the occupier in fraud of the cuſtom neglect to manure or cultivate the tenth land in a proper manner, the

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rector will be entitled to take his tithe as at common law. But even at common law corn is tithable as ſoon as it is ſevered and ſet out in ſheaves; and the taking the tithe when ſet out in ſhocks is by cuſtom. Now the cuſtom in queſtion ſeems ſo far beneficial to the rector that he may take his tithe when moſt convenient and beneficial to himſelf; and poſſibly he may alſo be entitled to the bind as well as the flower.

Lord KENYON, Ch. J. As this is a queſtion of great importance not only to the parties concerned in this cauſe but alſo to the public, it is right that it ſhould be ſettled at once. Whether tithes be or be not a proper mode of providing for a numerous claſs of perſons of great reſpectability, the clergy, I will not preſume to ſay: It is ſufficient for us in a court of law, that this is the mode eſtabliſhed by the laws of the country. It has been ſaid in the argument of this caſe that the manner of tithing on which the plaintiff inſiſts, is not only the moſt convenient, but that it is the only one in which juſtice can be adminiſtered to all the parties: but that is contradicted by the jury in this caſe; for though in general it is ſuppoſed that the opinions of laymen are not favourable to the rights of the clergy, the jury who tried this cauſe ſaid in expreſs terms that the mode of tithing relied on by the plaintiff would be open to much injuſtice. I never before heard any objection made to the caſe of *Walton* v. *Tyers:* We need not now inquire whether that caſe were or were not rightly decided; it is ſufficient to ſay that the decree made by the Court of Exchequer was affirmed in the Houſe of Lords: but if we were to canvaſs the propriety of that determination, my opinion would coincide with it; and it was there held that hops ought to be picked and gathered from the binds before they are tithable. But it has been contended that, though ſuch be the common law mode of tithing hops, the uſage in this pariſh differing from it is good in point of law. In order to prove this ſome caſes have been cited, and among the reſt one relating to the tithes of corn, where it was ſaid that the tenth part of the land ſhould be ſet out for the tithes: but by reading to the end of that caſe, it appears that ſuch a cuſtom cannot prevail, for *Wray*, Ch. J. there ſaid, that the cuſtom was againſt reaſon and ſo void (*a*). That there may be a particular mode of tithing in particular pariſhes, a modus decimandi, is perfectly clear:

but

(*a*) 1 *Leon*. 99. 2 *P. Wms*. 569.

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but the plaintiff's counſel cannot ſtate one ſingle caſe where a cuſtom has been held to be good by which the party paying tithes can be excuſed paying a part only of the tithe and ſubſtituting nothing elſe in lieu of the remainder. There may be a cuſtom to pay leſs than the whole tithe, where the perſon paying does ſomething in lieu of and as a compenſation to the parſon for the reſt; as in the inſtance of corn. By common law the tithe of corn is payable in ſheaves and not in ſhocks: but if the farmer adds his own labour and takes care of it until it is made into ſhocks, he may by cuſtom be excuſed by paying only an eleventh or twelfth part of the corn: but in ſuch caſes the labour of the farmer added to the quantum of the tithe taken is conſidered to be an equivalent for the full tithes. But in no caſe whatever can the farmer be excuſed by paying a part for the whole of the tithes where he does or pays nothing in lieu of the reſt. In the caſe of hops it was determined in *Walton* v. *Tyers* that a tenth part of the hops, after it is ſevered from the binds, is to be paid to the owner of the tithes. But it is now ſaid that the hops are not to undergo that proceſs before the tithes are payable, for that it is ſufficient for the farmer to ſet out the tenth row, or the tenth hill, before the hops are gathered. Now, independently of the above deciſion, and conſidering only the convenience and juſtice of the caſe, the propriety of that mode of tithing may well be doubted. Hops require much care and cultivation; and if it were ſufficient for the farmer to ſet out a tenth row, or tenth hill, perhaps the whole would not be cultivated in the ſame way, and leſs care would be beſtowed on the tenth row than on the other nine. Then it was argued that the tithe owner did not even know the extent of his own rights, for that he was entitled to the tenth bind as well as to the tenth part of the hops. But in the caſe above mentioned of *Walton* v. *Tyers* the contrary was determined; and this bears ſome analogy to the caſe of hay and clover: the tithe of hay is a great tithe; that of clover ſeed is a ſmall tithe; and ſome years ago a diſpute (*a*) aroſe between the impropriator and the vicar reſpecting ſome clover that was left for ſeed, the rector claiming the clover with the ſtalks; but the Court of Exchequer was of opinion that the rector was not entitled to the ſtalks, and that the vicar was entitled to the tithe of the clover ſeed as a ſmall tithe. The only ground that could raiſe the poſſibility of a doubt in this caſe is, that there may have been a real compoſition in the pariſh

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(*a*) Vid. *Wallis* v. *Pain*, *Com.* 633.

prior to the reſtraining and diſabling ſtatutes: but no evidence of ſuch a compoſition appears. A real compoſition for all ſmall tithes in the pariſh may be extended to hops as well as to other ſmall tithes. And though no written inſtrument can be produced ſhewing the agreement, every favourable intendment is made in theſe caſes, where the facts warrant ſuch an intendment. But if this were an agreement to pay a part only of the thing itſelf, it cannot be ſupported as a compoſition: there muſt be a quid pro quo, which the party may be able to deſcribe to the Court. In the caſe cited from *Siderfin*, Mr. J. *Twiſden* ſaid it was not then ſettled whether hops were tithable by the hill, the poll, or the buſhel: but that has been ſince ſettled, and we are now enabled to declare what the law is on this ſubject; and one part of that caſe is of importance as applicable to the preſent, for there it was ſaid by the Court that there could not be any cuſtom reſpecting hops, becauſe they were of modern introduction; ſo that there cannot be a modus decimandi for hops only. I am therefore clearly of opinion that the verdict given for the plaintiff muſt be ſet aſide, and that a new trial muſt be granted, in order that he may have an opportunity of proving (if he can) a real compoſition: the evidence given upon the former trial is not ſufficient to repel the common law right, which is in favour of the defendant.

Ashhurst, J., declared himſelf of the ſame opinion.

Grose, J. The ground of the verdict is, that the plaintiff had ſet out the tithes according to law: it appears by the evidence given that he ſet them out by the tenth hill, and the queſtion is, whether that be or be not the legal method of ſetting out the tithes of hops; for unleſs it be, the action cannot be maintained. Now it was decided in *Walton* v. *Tyers* that this was not the legal mode of ſetting out tithes, but that the owner of the tithes is entitled to the tenth part after the hops are ſevered from the binds. Then it was argued that whatever may be the mode of tithing hops in general, ſome real compoſition may be inferred. But the very thing contended for by the plaintiff is illegal; he inſiſts on a cuſtom to pay a part, inſtead of the whole, of the thing. Taking the hops after they are picked and meaſured is much more beneficial to the owner of the tithes than taking them by the hill or row: then the queſtion comes to this, whether we are to infer an agreement between him and the growers of hops that he ſhall accept the thing in a leſs beneficial ſtate than

than that in which he is by law entitled to have it without any compenſation. We could not infer ſuch an agreement, even if the introduction of hops into this country had been more ancient. The caſe of *Chitty* v. *Reeves* has been referred to in ſupport of this uſage: but it muſt be recollected that that caſe was determined in 1686, and that the caſe of *Walton* v. *Tyers*, which is contrary to it, did not happen until long afterwards, in the year 1753; and the reaſons given in ſupport of that caſe deſerve great attention, "that the mode of ſetting out the tithe of hops by meaſure after they are picked from the bind or ſtem is the faireſt and moſt equal method, and liable to the leaſt inconvenience: whereas the method of tithing by every tenth hill is liable to great fraud;" and the determination in that caſe was confirmed by the Houſe of Lords. Therefore as the plaintiff has not proved that which it was neceſſary for him to prove, namely, that he had ſet out the tithes regularly and according to law, he cannot retain this verdict.

LAWRENCE, J. If this caſe goes down to trial again, it may be material for the plaintiff's counſel to conſider two of the caſes that have been cited to ſhew that the cuſtom to take the tithes in the way contended for by the plaintiff is a good cuſtom in point of law. To the one, that the tenth part of the corn when growing on the land might be ſet out as the tithes, Ld. *Kenyon* has already given the ſame anſwer that *Wray* Ch. J. gave, that the cuſtom was againſt reaſon and void. The other, reſpecting the tithe of wood ſet out in the ſame way, is only a dictum of Dr. *Wood* (*a*), which is no authority in a court of law; and beſides, that was at a time when it was vexata queſtio whether tithes were payable for wood.

Rule abſolute.

(*a*) 3 *Burn's Ecc. L.* 448; *Wood's Inſt lib.* 2. *c.* 2. 180. But ſee *Hob.* 250.

PRESTON *againſt* EASTWOOD.

Thurſday, Jan. 26th.

If an award be made on an improper ſtamp, and no application be made to enforce the award, the Court will not ſet it aſide.

THE award in this caſe having been made on an improper ſtamp,

Law moved on a former day to ſet it aſide for that defect.

Chambre, who now ſhewed cauſe againſt that rule, ſaid that the application was made too early; that if the plaintiff had moved for an attachment for non-performance of the award, or taken any

other

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other ſtep to enforce it, this would have been a good objection. But he obſerved that the award might even now be rendered a valid inſtrument by procuring the proper ſtamp and paying the penalty for it. And that the award in its preſent form might be conſidered as a nullity, and ſo not the object of any motion at all. And

The Court, agreeing with him,

Diſcharged the rule.

Thurſday, Jan. 26th.

SMITH *againſt* MILLER.

Bail are not regularly put in, unleſs the name of the proper county be inſerted in the bail-piece.

THE defendant was arreſted on a latitat in *Surry*, returnable in laſt *Michaelmas* term; at the time of the return the parties were in a ſtate of compromiſe, and ſo continued until the 18th of *January*, when the defendant put in bail above, and gave notice thereof to the plaintiff. But notwithſtanding ſuch bail and notice, the plaintiff on the 19th of *January* procured an aſſignment of the bail bond; and on the 23d of *January* ſued out a bill of *Middleſex* againſt the defendant and his bail. Whereupon a rule was obtained, calling on the plaintiff to ſhew cauſe why the proceedings on the bail-bond ſhould not be ſtayed.

Reader now ſhewed cauſe againſt that rule; contending that thoſe proceedings were regular, becauſe the bail above was not regularly put in in the firſt action, the county of *Middleſex* having been inſerted in the bail-piece inſtead of *Surry*. And he cited *Garnett* v. *Heaviſide*, *Barn.* 63.

Lawes, in ſupport of the rule, obſerved that the caſe cited happened in the Common Pleas, the practice of which Court is no guide for the practice of this in general; much leſs ought it to be ſo in this particular inſtance, becauſe there are different filazers for different counties, whereas in this court there is only one filazer.

But *The Court* thought that the caſe of *Garnett* v. *Heaviſide* was deciſive; and therefore they

Diſcharged the rule.

Hodgson and others *againſt* Bell.

Friday, Jan. 27th.

X. became bound as a ſurety with *Y.* to *A.* on the 10th of *Auguſt* 1778, conditioned for payment in 6 months: On the 1ſt of *March* 1780 he became bound with *Y.* to *B.*, conditioned for payment in 6 months: On the 4th of *March* 1780 *Y.* became bound to *X.*, conditioned for payment of the two former bonds, and alſo to indemnify *X.* againſt thoſe two bonds: the money ſecured by the ſecond bond not being paid on the day when it became due, it was held that the laſt bond was thereby forfeited, though *X.* was not called on to pay the money in the ſecond bond until afterwards, and that *X.* might prove it as a debt under the commiſſion of bankrupt that iſſued againſt *Y.* after the forfeiture and before payment.

THIS was an action of debt on bond, dated 4th of *March* 1780, in 1000 *l.* given by the defendant to *Slack* the plaintiffs' teſtator; to which the defendant pleaded that the cauſe of action accrued before the defendant became bankrupt; and on the trial a verdict was given for the plaintiffs, ſubject to the opinion of this Court on a caſe reſerved.

In the year 1778 the defendant prevailed on *Slack*, the plaintiffs' teſtator, to become his ſurety for 500*l.* to *J. Greenwell*, and accordingly they executed a joint and ſeveral bond, dated 10th *Auguſt* 1778, to *Greenwell* in 1000*l.*, conditioned for the payment of 500*l.* and intereſt *on the 10th of February then next.* Two years afterwards *Slack* conſented to become ſurety for the defendant for 300*l.* to *T. Wheldon;* and on the 1ſt of *March* 1780 *Slack* and the defendant executed a bond to *Wheldon* in 600*l.*, conditioned for the payment of 300*l.* and intereſt to *Wheldon* on the 1ſt of *September* following. The defendant on the 4th of *March* 1780 gave his bond to *Slack*, on which the action is brought; and the condition (after reciting the two former bonds and conditions) was that the defendant ſhould pay to *Greenwell* and *Wheldon* reſpectively the ſaid two ſeveral ſums of 500*l.* and 300*l.* with intereſt, according to the true intent and meaning of thoſe two bonds, and in full diſcharge and ſatiſfaction thereof; *and alſo* that he (the defendant) ſhould ſave *Slack* his executors, &c. harmleſs and indemnified from all damages, &c. which he or they ſhould ſuffer by reaſon of *Slack*'s having become bound, &c. On the 15th of *April* 1786 the defendant became a bankrupt, and on the 12th of *April* 1788 he obtained his certificate. *Wheldon* proved the bond given to him under the defendant's commiſſion, and afterwards called on the plaintiffs, as *Slack*'s adminiſtrators, who paid the principal and intereſt on the 27th of *May* 1796.

F. Vaughan for the plaintiffs. The objection on which the defendant relies is, that the bond on which the action is brought was forfeited before the defendant's bankruptcy, that the debt might have been proved under his commiſſion, and conſequently that his certificate is a bar to this action. But by adverting to the dates of the different inſtruments, and the language uſed in the condition

condition of this bond, it will appear to have been the manifeſt intention of the parties that this ſhould only be conſidered as a bond of indemnity, and that as the plaintiffs were not damnified until after the defendant became a bankrupt, they have a right to enforce this bond at law. The condition of the bond in queſtion was to pay the two former bonds, and alſo to indemnify the plaintiffs' teſtator: but the condition is utterly impoſſible with regard to the firſt bond; for the day of payment of that bond was then paſt. This evidently ſhews that the parties only meant that this laſt bond ſhould be, not as the language of it in the former part of it imports for the payment of the firſt bond on the day therein mentioned, but only as a bond of indemnity to *Slack*. And if that were ſo with reſpect to the firſt bond, the condition of the third bond ſhews that ſuch was alſo their intention reſpecting the ſecond bond; for it is conditioned for the payment of the two ſeveral ſums of 500*l.* and 300*l.* "according to the true intent and meaning of thoſe bonds." The intention of the parties therefore being clear, the Court may conſtrue the condition of this bond according to that intention, though againſt the letter; according to what is ſaid in *Cart.* 109.

Lord Kenyon, Ch. J. (Stopping *Wood*, who was to have argued for the defendant.) This queſtion has been at reſt for more than half a century. Where the debt accrues ſubſequent to the bankruptcy, it cannot be proved under the commiſſion. Many caſes of that ſort happened in the time of Lord *Hardwicke*, who regretted that he could not permit the creditors to come in under the commiſſion: but this is one of thoſe caſes in which he would have had no difficulty; he would have been enabled by the rules of law to do what the juſtice of the caſe required, permitted the plaintiffs to prove their debt under the commiſſion. Where there is a legal debt prior to the bankruptcy, there is no doubt but that the creditor may come in under the commiſſion, as was held in the caſe *ex parte Wincheſter*, 1 *Atk.* 116., in which caſe, and alſo in that *ex parte Groome*, Ld. *Hardwicke* took this diſtinction; if the bond be forfeited at law before the bankruptcy, though in equity the money is not then payable, the Court will avail itſelf of the debt at law to protect the party who is in conſcience entitled: but if the bond be not forfeited before the bankruptcy, the creditor cannot prove his debt under the commiſſion. Then the queſtion here is whether the bond, on which the action is brought, were or were not forfeited before the defendant became a bankrupt;

and of that there can be no doubt. If the plaintiffs' teſtator had only become ſurety for the defendant on the firſt bond, there might have been ſome weight in the argument of the plaintiffs: but he had joined in two bonds, and the bond in queſtion was given to indemnify him againſt both thoſe bonds; now if any part of the condition of this bond were broken before the defendant's bankruptcy, the bond was forfeited at law, and the plaintiffs might have come in under the defendant's commiſſion, according to the caſes I have alluded to. If I abſtain from going into all the diſtinctions on this ſubject, it is becauſe Ld. *Hardwicke* explained and enlarged upon them all with great accuracy and perſpicuity in the caſes referred to: and it is ſufficient for me to refer in general to thoſe authorities, and to the ſubſequent caſes confirming them.

GROSE, J. This bond is conditioned for the performance of two things; the one for the payment of the ſums ſecured by the two former bonds, the other for the indemnity of the plaintiffs' teſtator; and if any part of the condition were broken, it is ſufficient. The plaintiffs' argument is well founded, as applied to the firſt bond; the bond was ſo far conditioned to do an impoſſible thing, to pay a ſum of money on a day then paſt: but the ſecond bond was not payable until afterwards, namely, on the 1ſt of September after the execution of the bond in queſtion; but the money ſecured by that bond was not paid on the 1ſt of September, and therefore the bond in queſtion was forfeited. In *Perkins* v. *Kempland*, 2 *Bl. Rep.* 1106, a bond given to ſecure an annuity was held to be forfeited becauſe one payment was not made on the day when it was due, the 19th of *January*, though the money was paid on the 1ſt of *February* following (*a*). Now that caſe ſeems to be an authority for our determination in this, that the bond on which the action is brought was forfeited before the defendant became a bankrupt, and therefore might have been proved under his commiſſion.

LAWRENCE, J. Giving full effect to the plaintiffs' argument, it only amounts to this that the condition of this bond was to indemnify the plaintiffs' teſtator againſt the firſt bond, to pay the money in the ſecond on the day when it ſhould become due, and alſo to indemnify him againſt that bond: but the ſecond

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(*a*) See alſo *Wyllie* v. *Wilkes*, *Dougl.* 519.

part of that condition not having been performed, this bond became forfeited, and conſequently it conſtituted a debt at law capable of being proved under the defendant's commiſſion.

Judgment of nonſuit (*a*).

(*a*) Vid. *Touſſaint* v. *Martinnant*, *ante*, 2 vol. 100; and *Martin* v. *Court*, *ante*, 5 vol. 640.

Friday, *Jan.* 27th.

Long *againſt* Blackall and others.

see 3. Ves. Jun. 486.

After a deviſe to an infant in ventre ſa mere for life in caſe it ſhould be a ſon, remainder to ſuch iſſue male or the deſcendants of ſuch iſſue male of ſuch child as at the time of his death ſhould be his heir at law, and in caſe at the time of the death of ſuch child there ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue male then living, or in caſe ſuch child ſhould not be a ſon, then over; the limitation over is not too remote to take effect.

A Case ſent from the Court of Chancery for the opinion of the Judges of this court ſtated that *George Blackall* being poſſeſſed of a certain meſſuage and premiſes in *Great Hazeley* in the county of *Oxford*, held by leaſe for years under the Dean and Canons of *Windſor*, by will dated 23d *April* 1709 directed that his wife ſhould poſſeſs the manſion houſe during her widowhood, and receive the rents and profits of the reſidue of the premiſes until ſhe ſhould marry or die, or until one of his ſons ſhould attain the age of twenty-one years, which ſhould firſt happen; and from and after the death or marriage of his ſaid wife, which ſhould firſt happen, as for and concerning the ſaid manſion houſe, and as for and concerning the reſidue of the premiſes from and after the death or marriage of his ſaid wife, or the time that one of his ſons ſhould attain the age of twenty-one, which ſhould firſt happen, he bequeathed the ſame to his ſon *Thomas* for life, and after his deceaſe then to ſuch iſſue male or the deſcendants of ſuch iſſue male of *Thomas* as at the time of his death ſhould be his heir at law; and in caſe at the time of the death of *Thomas* there ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue male then living, then he bequeathed the ſame in truſt to his (the teſtator's) ſon *George Sawbridge* for life, and after his deceaſe then to ſuch iſſue male or the deſcendants of ſuch iſſue male of his ſaid ſon as at the time of his death ſhould be his heir at law; and in caſe at the time of the death of the ſaid *George Sawbridge* there ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue male then living, then he bequeathed the ſaid premiſes &c. to the child with which his (the teſtator's) wife was then enſient, in caſe it ſhould be a ſon, during his life, and after his deceaſe then to ſuch iſſue male or the deſcendants of ſuch iſſue male of ſuch child as at the time of his death ſhould be his heir

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at law; and in caſe at the time of the death of ſuch child there ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue male then living, or in caſe ſuch child ſhould not be a ſon, then he bequeathed the ſame to *Philippa Long* her executors, &c. The teſtator died on the 1ſt of *June* 1709, leaving his wife *Martha* and two ſons, *Thomas* and *George Sawbridge Blackall*, him ſurviving; the executors named in the will proved the ſame in the proper Eccleſiaſtical Court and aſſented to the above bequeſt. *Martha Blackall*, the wife of the teſtator, at the time of making his will and of his death, was enſient with a ſon, who was afterwards born and called *John Blackall*; and *Martha Blackall* afterwards died on the 16th *September* 1768. *George Sawbridge Blackall* died on the 14th of *April* 1753, without iſſue. *John Blackall* died on the 5th *March* 1754 without iſſue; and *Thomas Blackall* died on the 2d *March* 1786 without iſſue.

The queſtion directed to be made by the Lord Chancellor for the opinion of the Court of King's Bench was "Whether the limitation to *Philippa Long* were good in the events that have happened."

Chambre for the plaintiff contended that the ultimate limitation over to her was not too remote. That depends on the queſtion whether an infant in ventre ſa mere muſt not be conſidered as a life in being for the preſent purpoſe, or if not ſo in ſtrictneſs whether the ſmall interval of time before the birth is ſuch as the law will conſider as tending to create a perpetuity, and therefore avoid the limitation over. The uſual period allowed by law after which an executory deviſe may take effect is, a life or lives in being and twenty-one years afterwards, as ſettled in the caſe of the Duke of *Norfolk* (*a*), and other caſes grounded on the doctrine there eſtabliſhed. Every common caſe of a limitation over after a deviſe to a life in being, with remainder in tail to his unborn iſſue, includes the ſame contingency as the preſent; for the tenant for life may die leaving his wife enſient: and the only difference is that the period of geſtation occurs at the beginning inſtead of the end of the firſt eſtate for life. But that cannot vary the queſtion as far as it reſpects the tendency of any ſuch limitation to create a perpetuity. By the general rule of law an infant in ventre ſa mere is conſidered as a life in being: this was recognized

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(*a*) 3 *Ch. Caſ.* 1, *Pollexf.* 223.

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recognized in a late caſe of *Doe* d. *Clarke* v. *Clarke* (*a*), where it was held that a poſthumous child ſhould take under a deviſe of lands to "all and every ſuch child or children of *B.* as ſhould "be living at the time of his deceaſe:" and there the Court ſaid that independently of any queſtion of intention in the particular caſe, an infant in ventre ſa mere muſt be conſidered as a perſon in being. He was then ſtopped by the Court.

Eaſt, for two of the defendants, Ld. *Maccleſfield* and *Muſgrave*, who had a diſtinct intereſt from the others, reſted their claims, on the preſent caſe as ſtated, on the ſame point (*b*).

Wood was proceeding to argue for the other defendants: but the Court expreſſed themſelves ſo clearly ſatisfied that the ultimate limitation to the plaintiff was good, that he declined arguing the point; ſaying that he had no reaſon, from the view he had taken of the ſubject, to expect that he ſhould be able to alter their opinion.

Lord KENYON, Ch. J. The rules reſpecting executory deviſes have conformed to the rules laid down in the conſtruction of legal limitations, and the Courts have ſaid that the eſtate ſhall not be unalienable by executory deviſes for a longer time than is allowed by the limitations of a common law conveyance. In marriage ſettlements the eſtate may be limited to the firſt and other ſons of the marriage in tail, and until the perſon to whom the laſt remainder is limited is of age the eſtate is unalienable. In conformity to that rule the Courts have ſaid ſo far we will allow executory deviſes to be good. To ſupport this poſition I could refer to many deciſions: but it is ſufficient to refer to the Duke of *Norfolk*'s caſe, in which all the learning on this head was gone into; and from that time to the preſent every Judge has acquieſced in that deciſion. It is an eſtabliſhed rule that an executory deviſe is good if it muſt neceſſarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of geſtation.

(*a*) 2 *H. Black.* 399. Vide alſo 1 *P. Wms.* 246. 486. 2 *P. Wms.* 692. 2 *Freem.* 223. 2 *Atk.* 117. 1 *Wilſ.* 106. *Cowp.* 309., *ante*, 5 vol. 49. Another ſet of caſes, as 1 *Veſ.* 111. 2 *Bro. Ch. Rep.* 38 and 63. ſeems to have proceeded upon the preſumption of an intention to the contrary in the perſon under whoſe will the infant claimed; and vid. 2 *Bro. Ch. Rep.* 320.

(*b*) For the purpoſe of ſtating the caſe for the opinion of this Court on the validity of the ultimate limitation, the plaintiff's name was directed by the Lord Chancellor to be inſerted in the will inſtead of the words "*ſuch perſons as ſhall then be my legal repreſentatives*," under which deſcription theſe two defendants claimed.

Lawrence, J. The deviſe over in this caſe muſt take effect, if at all, after a life which muſt be in being within nine months after the deviſor's death (*a*).

The following certificate was afterwards ſent to the Lord Chancellor.

This caſe has been argued before us by counſel. We have conſidered it, and are of opinion that the limitation to *Philippa Long* is good in the events that have happened.

Feb. 27th, 1797.

Kenyon,
W. H. Ashhurst,
N. Grose,
S. Lawrence.

(*a*) In *Goodtitle* d. *Gurnall* v. *Wood*, 23d of *June* 1740, *C. B.* Ld. Ch. J. *Willes*, in delivering the opinion of the Court, ſaid, "They (namely, executory deviſes) have not been conſidered as bare poſſibilities, but as certain intereſts and eſtates, and have been reſembled to contingent remainders in all other reſpects, only they have been put under ſome reſtraints to prevent perpetuities; as, firſt, it was held that the contingency muſt happen within the compaſs of a life or lives in being or a reaſonable number of years; at length it was extended a little farther, namely, *to a child in ventre ſa mere at the time of the father's death, becauſe as that contingency muſt neceſſarily happen within leſs than nine months after the death of a perſon in being, that conſtruction would introduce no inconvenience*; and the rule has in many inſtances been extended to twenty-one years after the death of a perſon in being, as in that caſe likewiſe there is no danger of a perpetuity." M.S. see P. C. Vin. Abr. Devise [illegible] L. 2. pl. 38. & thence taken into 2. Eq. Cas. Abr. Devise K. pl. 21.

Doe on the Demiſe of Harman and Wife *againſt* Morgan.

Friday, Jan. 27th.

One ſeiſed in fee of a copyhold of inheritance by deſcent ex parte maternâ ſurrendered the ſame to the uſe of himſelf for life, remainder to ſuch perſons and for ſuch eſtates as he ſhould by deed or will atteſted by three witneſſes appoint, remainder in default of appointment to himſelf in fee; after which he made a mortgage and ſurrendered to the uſe of the mortgagee in fee, who upon re-payment of the principal and intereſt ſurrendered again to the mortgagor: held that the line of deſcent was thereby broken, and that the eſtate deſcended to the paternal heir.

At the trial of this ejectment before Mr. Juſtice *Heath* at the laſt aſſizes for the county of *Monmouth*, a verdict was found for the plaintiff, ſubject to the opinion of this Court on the following caſe.

H. Lewis, being ſeiſed in fee of the premiſes in queſtion, which are copyhold of inheritance within the manor of *Trellegg*, and which deſcended to him ex parte maternâ, on the 7th of *July* 1785 duly ſurrendered them to the uſe of himſelf and his aſſigns for life, with remainder to the uſe of ſuch perſons and for ſuch

see opin.n on case 1. July 1811.

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eſtates as he ſhould by deed or will ſigned in the preſence of three witneſſes direct, with remainder over in default of appointment or deviſe to his heirs and aſſigns according to the cuſtom of the manor. On the 6th *Auguſt* 1788 at a Court Baron of the manor *H. Lewis* ſurrendered the premiſes to the uſe of *J. Baldwin* his cuſtomary heirs and aſſigns, to hold to the uſe of *J. Baldwin* and his cuſtomary heirs and aſſigns. At the foot of the ſurrender a memorandum was written that the ſurrender was made for ſecuring the re-payment of 1000*l.* and intereſt then due from *Lewis* to *Baldwin*, and that after payment thereof the premiſes were to revert to and follow the uſes of the above mentioned ſurrender made by *Lewis* on the 7th *July* 1785; and *Baldwin* was thereupon admitted tenant. In 1792 *Baldwin* died ſeiſed, and on his death the premiſes deſcended to his infant ſon and cuſtomary heir; and ſoon afterwards *Lewis* paid the mortgage-money and intereſt to *Baldwin*'s executor. In *March* 1794 *J. Baldwin* the infant appeared perſonally before the lord of the manor out of court, and was admitted tenant of the premiſes in queſtion to hold to him his heirs and aſſigns according to the cuſtom of the manor; and on the ſame day the infant by virtue of an order of the Court of Chancery ſurrendered the premiſes into the hands of the lord, to the uſe of the ſaid *H. Lewis* his heirs and aſſigns according to the cuſtom of the manor. On the 11th of *April* 1794 at a Court Baron *H. Lewis* was admitted tenant of the premiſes to hold to him his heirs and aſſigns according to the cuſtom of the manor, and on the 11th of *January* 1795 he died inteſtate. *Suſannah Harman*, one of the plaintiffs, is the paternal heir of *H. Lewis*, and the defendant is his maternal heir. The queſtion for the opinion of the Court is, whether on the death of *H. Lewis* the premiſes in queſtion deſcended to his maternal or paternal heir?

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Dauncey for the plaintiff was ſtopped by the Court.

Ruſſell for the defendant ſaid, that the only ground on which he could reſt the defendant's title was, that the legal eſtate remained in *H. Lewis* notwithſtanding the ſurrender to *Baldwin* the mortgagee, who had an equitable intereſt only. For at the time of ſuch ſurrender *H. Lewis* had only an eſtate for life with a power of appointment by deed or will atteſted by three witneſſes; and no ſuch appointment having been made, the legal eſtate was not deveſted from him by the ſurrender in fee to *Baldwin*, unleſs it could operate upon the reverſion in fee, in default of appointment. The defendant therefore, as heir ex parte maternâ, is intitled, according to the caſe of *Abbot* v. *Burton*, *Salk*. 590.

Lord Kenyon, Ch. J. If it were material to decide that point in this caſe, I ſhould think that an appointment by *Lewis* by deed would have been good, though not executed in the preſence of three (*a*) witneſſes, and that that number of witneſſes only applied to an appointment by will. But it is immaterial to conſider that point here. The ſurrender in favour of *Baldwin* the mortgagee was not merely of an equitable, but of the legal, eſtate; *Baldwin* was admitted in fee under it; and his heir at law ſurrendered to *Lewis* in fee. This then is like a feoffment and refeoffment (*b*), which, it has been long ſettled, breaks the line of deſcent; and conſequently the leſſor of the plaintiff who is the heir ex parte paternâ is entitled to recover.

Poſtea to the plaintiff.

(*a*) It was ſtated at the bar, though it did not appear in the caſe, that this deed was in fact atteſted by three witneſſes.

(*b*) Vid. *Co. Lit.* 12. *b*. *Price* v. *Langford*, 1 *Show*. 93. *Salk*. 337. and *Carth*. 141.

The King *againſt* The Inhabitants of Llanbedergoch.

Saturday, *Jan*. 28th.

Held that a perſon, who, after reſiding on a tenement of 10*l*. *per annum* for twenty-nine days, was *forcibly* prevented reſiding there eleven days more, did not thereby gain a ſettlement.—A reſidence for forty days is indiſpenſably neceſſary for that purpoſe. This Court will not infer fraud from circumſtances: fraud muſt be ſtated in expreſs terms.

TWO juſtices removed the pauper and his family from *Llanbedergoch* to *Pentraeth* both in the county of *Angleſea*; the Seſſions on appeal quaſhed the order of removal, ſubject to the opinion of this Court on the following caſe.

The pauper was tenant of a tenement in the pariſh of *Lleckylehad*, called *Peurhyw*, under *W. Griffith* for the year 1795. At *May* 1795 he received notice to quit *Peurhyw* at the *All Saints* following. The pauper ſaid he had no place to go to, and if compelled to quit he would take down a barn he had built upon the farm, and cut the gorſe that grew on the hedges. *Griffith* then ſaid, ſuppoſing we exchange, you ſhall go to *Weyû Emâd*, a tenement in the pariſh of *Llanbedergoch* that *Griffith* then occupied under *Pritchard* at the yearly rent of 10*l*. 10*s*., to which the pauper agreed, and promiſed not to take down the barn at *Peurkyw*. It was then agreed between them that they were not to mention to any perſon that the pauper was to go to *Weyû Emâd*, leſt the reſpondents ſhould hear of it and prevent the pauper getting into poſſeſſion of *Weyû Emâd*. The pauper was apprehenſive that they would not conſent to his coming to their pariſh,

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pariſh, he being a man of bad character. On the 16th of *November* 1795 the pauper and his family removed from *Peurkyw* to *Weyû Emâd*. He did not remove his furniture there, leſt the reſpondents ſhould ſee him, he having been informed that if he could get into poſſeſſion of a tenement of 10*l.* a-year and ſleep in the houſe for one night he could not be turned out of poſſeſſion. *Griffith* would not have let the pauper into poſſeſſion of *Weyû Emâd* but for the purpoſe of inducing him to quit *Peurkyw* and to prevent his taking down the barn; yet he thought him a reſponſible perſon. The pariſhioners of *Pentraeth* were not privy to the tranſaction. The pauper reſided twenty-nine days on the premiſes, when *Pritchard* aided by ſome of the pariſhioners of *Llanbedergoch*, the overſeers of the poor of the pariſh of *Llanbedergoch* being then with them, *forcibly* removed him and his family from the tenement called *Weyû Emâd*, and thereby prevented him from reſiding in the tenement for the term of one year, or for forty days part thereof, whereby a legal ſettlement might have been gained; and he has ever ſince been forcibly kept out of the poſſeſſion of the tenement. The pauper did not do any other act to gain a ſettlement in *Llanbedergoch*. He was afterwards taken up at *Pentraeth*, and ſent under a vagrants' paſs to the pariſh of *Llanbedergoch*. The pauper's place of legal ſettlement prior to his taking the tenement called *Weyû Emâd* was in the pariſh of *Pentraeth*.

Gibbs in ſupport of the order of Seſſions. It is clear that if the pauper had reſided on the tenement in *Llanbedergoch* forty days he would thereby have gained a ſettlement; it being immaterial whether or not he paid any rent for it. *R.* v. The Inhabitants of *Fillongley; ante*, 1 vol. 458. Then, as he was by force prevented by the overſeers and pariſhioners of *Llanbedergoch* from reſiding there ſo long, he ought to have the benefit of that ſettlement; otherwiſe they would be taking advantage of their own wrong. If the pauper had by fraud obtained and kept the poſſeſſion of a houſe for forty days, the circumſtance of the fraud would have prevented his gaining a ſettlement; and if ſo, the fraud uſed by the pariſh officers ought not to defeat his ſettlement. In the caſe of hiring and ſervice it has been determined that if the maſter fraudulently diſcharge the ſervant juſt before the expiration of the year, it will not defeat the ſervant's ſettlement (*a*); and the

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(*a*) Vid. *Eaſtland* v. *Weſthorſeley*, 1 *Str.* 526.

ſame reaſoning equally applies to a ſettlement to be gained by any other means.—In anſwer to an obſervation from the Court, that no fraud was ſtated in the caſe, and that fraud could not be preſumed, he ſaid that it was ſtated as a fact in the caſe that the pariſh officers uſed *force* to prevent the pauper's gaining a ſettlement in *Llanbedergoch*, and that force implied fraud; and that where the facts conſtituting the fraud were ſtated, it was not neceſſary that fraud ſhould be found in expreſs terms.

Leyceſter and *Ellis* contra were ſtopped by the Court.

Lord Kenyon, Ch. J. In order to gain a ſettlement by living on a tenement of 10*l. per annum*, it is abſolutely neceſſary that the party ſhould reſide there for forty days. With regard to the fraud, which is ſuggeſted: where a caſe is pregnant with circumſtances of fraud, the Court have repeatedly ſaid they cannot infer fraud; that fraud is a fact to be expreſsly ſtated. It was ſo ſaid in *R.* v. *Preſton*, *Burr. S. C.* 69 (*a*).

Per Curiam (*b*), Order of Seſſions quaſhed.

(*a*) Vid. *R.* v. *Tamworth*, *Burr. S. C.* 774; *R.* v. *Tedford*, *ib.* 60; and *R.* v. *Fillongley*, *ante*, 1 vol. 461.

(*b*) Mr. Juſtice *Aſhhurſt* was indiſpoſed on this day, and was not able to attend in court until the 9th of *February*.

The King *againſt* The Juſtices of Sussex.

Saturday, Jan. 28th.

Where the Quarter Seſſions are held at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original Seſſions but before the adjourned Seſſions, an appeal at the next enſuing adjourned Seſſions is in time, and ought to be received.

A Rule was obtained in the laſt term calling on the defendants to ſhew cauſe why a mandamus ſhould not iſſue, directing them to receive and hear an appeal againſt an order of two juſtices for the removal of *T. Laycock* his wife and children. It appeared that in point of fact there are two diviſions, though not legally recognized, in the county of *Suſſex*, the Eaſtern and Weſtern, though there is but one commiſſion of the peace for the whole county; and the Quarter Seſſions are always held firſt in the Weſtern, and afterwards adjourned into the Eaſtern, diviſion. The Seſſions commence in the Weſtern diviſion on the *Tueſday*. The removal in queſtion was made on the *Wedneſday*, being the 13th *July* 1796, to the pariſh of *Peaſmarſh*, which is ſituated in the Eaſtern diviſion; the adjournment day into which was on the *Friday* following. The appeal was not lodged at that Seſſions, but was preferred at the next *October* Seſſions held by adjournment in the ſame Eaſtern diviſion. An objection was there made that it came too late, and the Seſſions, after hearing evidence

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of the facts, and taking into conſideration the diſtance of the appellant pariſh, were of opinion that the adjournment Seſſions in *July* were the next poſſible Seſſions at which the appeal ought to have been preferred; that it was now too late, and that they had no juriſdiction to examine into the merits of the appeal.

Leach now ſhewed cauſe. The Seſſions having determined that in point of fact the pariſh to which the removal was made might have appealed to the adjourned Seſſions held in the Eaſtern diviſion in *July*, within which diſtrict the cauſe aroſe, the only queſtion is, whether in point of law the pariſh were not bound to lodge their appeal then. Although the diviſions of the county are not legally ſo conſtituted, yet the practice of holding the Seſſions in the manner ſtated has been invariably obſerved; and therefore all perſons reſiding within the juriſdiction muſt be taken to be cognizant of, and are bound by, it. The adjournment day is on the *Friday*, and therefore in reſpect to the inhabitants of the Eaſtern diviſion the Seſſions do not commence till that day; and the removal having taken place on the *Wedneſday* preceding, the appellant pariſh ought to have entered their appeal on the *Friday*, purſuant to the conſtant practice; and he cited 19 *Vin. Abr.* 356. *pl.* 2. and 1 *Sid.* 149. to this effect. But if that were otherwiſe, and the act of parliament requiring the appeal to be made at the next Seſſions muſt be conſtrued with reference to the original Seſſions, and not to that held at another place by adjournment, ſtill this application cannot be ſuſtained; for in that caſe the appeal ought to have been preferred to the original Seſſions held in *October*, and not to the adjourned one, to which it was made. Therefore, quâcunque viâ datâ, this rule muſt be diſcharged.

Partington and *Bayley* contrà were ſtopped by the Court.

Lord KENYON, Ch. J. The convenience and juſtice of the caſe are ſo obviouſly in conformity with the ſtrict letter of the ſtatute (*a*) that there can be no doubt on the proper conſtruction of it. There is but one commiſſion of the peace, and one Quarter Seſſions held for the county in each quarter; although for convenience the magiſtrates hold the Seſſions firſt in one part of the county, and then by adjournment in the other part. The next Quarter Seſſions therefore muſt neceſſarily mean the next original Quarter Seſſions held for the county; for the adjournment

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(*a*) 43 *Eliz. c.* 2.

adjournment is only a continuation of the ſame Seſſions. The removal therefore having been made after the commencement of the *July* Seſſions, the appeal was properly preferred at the *October* Seſſions following. Neither is there any thing in the objection that it ought then to have been made to the original Seſſions in *October*, for that would be directly contrary to the practice which has always prevailed in counties where the Seſſions are adjourned from one place to another within the county; and his Lordſhip referred to *R.* v. *Monks Riſborough* (*a*), and *R.* v. *Hinderclave* (*b*).

Per Curiam, Rule abſolute.

(*a*) 2 *Conſt's Bott*, 834. (*b*) *Ib.* 835.

Fuller and others *againſt* Prest.

Saturday, *Jan.* 28th.

If a ſheriff's officer upon an arreſt take an undertaking for the appearance of the party inſtead of a bail-bond without the plaintiff's aſſent, and bail above is not duly put in, the ſheriff is liable to an action for an eſcape, and the Court will not relieve him by permitting him to put in and juſtify bail afterwards.

THE defendant, having been arreſted on the 21ſt of *November* by the ſheriff of *Middleſex* at the ſuit of the plaintiffs, was permitted to go at large on an undertaking given by his attorney for his appearance. Bail above not having been put in in time, or bail-bond taken, the plaintiffs brought an action againſt the ſheriff for an eſcape. On the 7th of *January* the defendant became a bankrupt. On the 26th of this month notice of bail was given, and now a motion was made to juſtify theſe bail, the ſheriff offering to pay the coſts of the action brought againſt him.

Lawes oppoſed the juſtifying of the bail. This is a queſtion of conſiderable importance; and this oppoſition to the juſtification of bail is made in order to put a ſtop to a practice introduced by the ſheriffs' officers, in direct oppoſition to the ſtat. 23 *H.* 6. *c.* 9., of ſubſtituting this kind of undertaking for a bail-bond, and which has of late years increaſed to a great degree. This practice was evidently introduced for the emolument of the officers; and it ought to be checked becauſe it operates to the prejudice of the plaintiffs, and ſometimes even to that of defendants. By the ſtat. 23 *Hen.* 6. *c.* 9., the fees of the officers on taking bail-bonds are limited; whereas thoſe exacted when theſe undertakings are given are not limited by any rule, but depend on the conſcience of the officer. The plaintiff alſo is prejudiced; becauſe if a bail-bond be taken, he has a right under the ſtat. 4 *An.* *c.* 16. *ſ.* 20. to call for an aſſignment of it: whereas this practice deprives him of that ſecurity, and occaſions conſiderable

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FULLER *againſt* PREST.

delay, as in the inſtance of ruling the ſheriff a term is frequently loſt. Beſides, it was ſolemnly determined in *Rogers* v. *Reeves* (*a*) that ſuch an undertaking as the preſent was illegal.

Henderſon contrà. In almoſt all the caſes in which an attachment has been moved for againſt the ſheriff, the Courts have aſſiſted the ſheriff and the defendant, if they could put the plaintiff in the ſame ſituation in which he was before the irregularity happened. Here the ſheriff offered to pay the coſts of the action brought againſt him, and to put in good bail, which was all the plaintiff could have had if a bail-bond had been regularly taken. The ſheriff is not bound in all caſes to take a bail-bond; he may let the defendant out of cuſtody at his peril, it being ſufficient that he has him at the return of the writ. *Atkinſon* v. *Mattiſon*, *ante*, 2 vol. 172. But the plaintiffs alſo have been irregular in their proceedings; they ſhould have ruled the ſheriff to return the writ before they ſued the ſheriff. The obſervations made on the extortion of the ſheriffs' officers may be laid out of the caſe, there being no pretence to ſay that any extortion was practiſed in this inſtance: whenever ſuch a caſe ariſes, it will be ſufficient to puniſh the offender.

Lord KENYON, Ch. J. I am of opinion that the bail ought not to be permitted to juſtify in this caſe. There is no doubt but that many undertakings to put in bail have been enforced by this Court, where the plaintiff or his attorney has accepted the undertaking; in ſuch a caſe the acceptance being the act of the party, he has no reaſon to complain that a bail-bond was not given. But infinite miſchief and inconvenience would follow if we were to permit this practice to obtain. The Legiſlature, being aware of the extortion that might be practiſed by ſheriffs' officers on an arreſt, endeavoured to guard againſt it as well as they could; and by the ſtat. 23 *Hen.* 6. *c.* 9. they pointed out the manner in which bail-bonds ſhould be taken, with the fees of the officers, and declared that all other obligations, not warranted by the act, ſhould be void; and the ſame reaſon that applies to bonds equally applies to other undertakings. I fully ſubſcribe my opinion to the caſe of *Rogers* v. *Reeves*, where a diſtinction between undertakings to the party and thoſe to the bailiff was anxiouſly taken; and here if the plaintiffs had accepted the undertaking, all would have been well. But this is a novel experiment, and if it were ſucceſsful it would open a door to

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(*a*) *Ante*, 1 vol. 418.

groſs impoſition. I will not enter into the queſtion whether the plaintiff would be in a better or worſe ſituation if this practice were to prevail: but we ought to prevent as far as we can the ſheriffs' officer deſtroying the wiſe proviſions of the ſtat. 23 *H.* 6. by fixing the price of his own indulgence inſtead of complying with the requiſitions of the act.

ASHHURST, J. Neither the ſheriff or his officers ought to ſhew favor to any perſon arreſted by them: they ſhould on all occaſions diſcharge their duty; and their forbearance is in general not an act of humanity, but of avarice.

GROSE, J. The ſheriffs' officer in this caſe ſeems to have acted contrary to his duty; and the obſervations made on this practice by the plaintiff's counſel are warranted by a great deal of experience that I have had on this ſubject. Inſtead of taking a bail-bond as the ſtatute requires, he has taken another kind of undertaking under the pretence of an indulgence to the defendant, for which he exacts his own price; and therefore if we were to encourage this practice, we ſhould be giving an encouragement to the ſheriffs' officers to infringe the law. This is a practice injurious to the plaintiff as well as to the defendant; and if this application be made on behalf of the ſheriff, he is not entitled to any indulgence becauſe he has broken the law; if it come from the defendant, the anſwer is, that he has conſpired with the ſheriff, and therefore we will not aſſiſt him.

LAWRENCE, J. The caſe of *Atkinſon* v. *Matteſon* does not apply to this caſe: it does not prove that the ſheriff may diſcharge a defendant on an arreſt without taking a bail-bond; it only ſhews that if he does let the defendant out of cuſtody, he may retake him before the return of the writ without being liable to an action for a falſe impriſonment. But the miſchiefs, againſt which the Legiſlature intended to guard by the ſtat. 23 *Hen.* 6., would not be prevented if this conduct of the ſheriffs' officer were to be endured. If the plaintiff or his attorney had indeed conſented to accept the undertaking, that would have varied the caſe: but this is an attempt to compel him to accept it, in contravention of the ſtat. 23 *Hen.* 6. This practice would be injurious to the plaintiff and oppreſſive on the defendant. The former would be deprived of the remedies which the law has given him; and the latter would be ſubject to the extortion of the ſheriffs' officers. Here the officer comes for a favor, but he is not in a ſituation to aſk it.

Rule refuſed.

Tueſday,
Jan. 31ſt.

DENN *againſt* JOSHUA WHITE and Wife.

A recovery in ejectment againſt the wife cannot be given in evidence in an action againſt the huſband and wife for meſne profits.

THIS was an action of treſpaſs for meſne profits, brought in the name of the nominal plaintiff in ejectment, and it was tried before Mr. Juſtice *Rooke* at the laſt ſummer aſſizes at *York*. The notice of declaration in ejectment was ſerved on the wife only, and in her own name only. It was proved that her huſband allowed her a ſeparate maintenance, and that he had not been near her for many years. The ſteward of the leſſor of the plaintiff proved that the houſe belonged to the wife, and that ſhe had paid the rent up to *May* 1794. The learned Judge refuſed to receive the judgment in ejectment in evidence againſt the huſband. The plaintiff, not being able to prove any treſpaſs without the judgment in ejectment, was nonſuited.

In the laſt term a rule was obtained, calling on the defendant to ſhew cauſe why the nonſuit ſhould not be ſet aſide; againſt which

Chambre was now to have ſhewn cauſe: but

Law and *J. Heywood* were called on to ſupport their rule.—In *Withers* v. *Harris* (*a*), Lord *Holt* ſaid "A recovery in ejectment binds the right and intereſt of him that has the inheritance, and makes a title in the plaintiff." Then if the recovery in ejectment make a title in the plaintiff, it is evidence in rem as to this purpoſe, though the parties be not the ſame. At all events the recovery in ejectment was evidence againſt the wife. In *Aſlin* v. *Parkin* (*b*), Lord *Manſfield* in delivering the opinion of all the Judges ſaid "The tenant is concluded by the judgment, and cannot controvert the title;" and "This judgment like all others only concludes the parties as to the ſubject matter of it." Though therefore the action is brought againſt the huſband and wife, the one may be acquitted and the other found guilty of the treſpaſs; and in this way of conſidering the queſtion the judgment in ejectment may be admitted as evidence to affect the wife, but not the huſband, who is only joined for conformity. But

The Court ſaid that the judgment in ejectment could not be admitted as evidence againſt the huſband becauſe he was no party to that ſuit. That what was ſaid by Lord *Holt* in the caſe referred to muſt be conſidered with reference to the ſubject. That the

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(*a*) Salk. 258. (*b*) 2 Burr. 668.

caſe of *Aſlin* v. *Parkin* alſo ſhewed that the recovery in ejectment operated as an eſtoppel to the *parties* to controvert the plaintiff's title. That in this caſe there was no evidence of the treſpaſs but the judgment in ejectment; and that the wife's confeſſion of a treſpaſs committed by her could not be given in evidence to affect the huſband in an action in which he is liable for the damages and coſts.

Rule diſcharged.

DRAKE *againſt* SYKES, Bart.

Tueſday, Jan. 31ſt.

In an action of treſpaſs againſt the ſheriff for the wrongful act of a bailiff, it is not enough (in order to affect the ſheriff) to prove him a general bailiff, and that he had given a bond of indemnity to the ſheriff as ſuch, together with proving the copy of the warrant under which he entered and ſeized the plaintiff's goods: but the privity between ſuch bailiff and the ſheriff muſt be eſtabliſhed in the particular tranſaction on the beſt evidence, by proving the original warrant of execution directed by the ſheriff to ſuch bailiff; or at leaſt by proving ſuch notice to produce it as will, in caſe of nonproduction, let in ſecondary evidence of its contents.

THIS was an action of treſpaſs brought againſt the late ſheriff of *Yorkſhire* for taking the goods of the plaintiff. At the trial before *Rooke*, J. at the laſt *York* aſſizes it appeared that the goods had been taken by one *Sugden*; and the only queſtion was whether there was evidence ſufficient to make the defendant reſponſible for *Sugden*'s acts. As to which *Robert Scott*, under-ſheriff to the defendant, gave oral evidence that *Sugden* was appointed bailiff to the defendant by deputation, and acted as ſuch; but no deputation was produced, nor any notice given to produce it. But *Scott* produced *Sugden*'s bond of ſecurity to *Sykes*; which the learned Judge admitted without any proof of the bond itſelf, as it was produced by the under-ſheriff from the defendant's office. It was further proved by the plaintiff's attorney that at the time when the goods were taken *Sugden* delivered to him a copy of the warrant of execution, which was produced in court and ruled to be evidence by the learned Judge, who was of opinion that upon the whole the relation between the defendant and *Sugden* was ſufficiently eſtabliſhed to make the former liable for the acts of the latter; and a verdict was accordingly taken for the plaintiff for 62*l.* 11*s.*, with liberty for the defendant to move for a new trial without coſts. A rule niſi having accordingly been obtained for this purpoſe in the laſt term, on the ground that there was no ſufficient privity eſtabliſhed by the evidence between the ſheriff and *Sugden* ſo as to affect the former by the acts of the other in this tranſaction,

Law and *Scarlett* now ſhewed cauſe againſt the rule. They admitted that a privity muſt be ſhewn between *Sugden* and the defendant in order to fix him with the other's acts; but contended that ſuch privity was here eſtabliſhed in two ſeveral ways. 1. By evidence of a general privity ariſing out of *Sugden*'s appointment as bailiff to the defendant, which was admitted by the under-ſheriff, who ſpoke alſo to his having acted as ſuch, and who produced the general bond of indemnity given by *Sugden* to the ſheriff. This general privity is noticed by the law in the caſe of a bound and ſworn bailiff, though not in the caſe of one ſpecially appointed for a particular purpoſe; and *Sugden* was proved to be of the former deſcription. In *Dalt. Off. of Sheriff*, the oath of the ſheriff is ſet out, wherein he ſwears that he will take no bailiffs but ſuch as he will anſwer for. And by 27 *Eliz. c.* 12., it appears that general bailiffs are alſo required to take the oath preſcribed by that act for the faithful execution of their office: whereas a ſpecial bailiff is moſt frequently appointed at the requeſt of the party himſelf who takes out the execution; and ſuch an one has been held not to be within the ſtatute. Sir *W. Jon.* 250. 2 *Lev.* 151. And in the new oath of the ſheriff, appointed to be taken by the 3 *Geo.* 1. *c.* 15. *ſ.* 18. he ſwears "that he will take no bailiffs into his "ſervice but ſuch as he will anſwer for; and will cauſe each "of them to take ſuch oaths as he does in what belongs to their "buſineſs and occupation." There is this further diſtinction between the two ſorts of bailiffs, that the known and ſworn officer has no occaſion for a ſpecial warrant to juſtify what he does by virtue of his office at the command of the ſheriff as the other has. *Keilw.* 86. *b. Dalt. Off. of Sher. c.* 21. So a ſworn or known officer need not ſhew his writ when demanded, as a ſpecial bailiff muſt. *Dalt. c.* 22. Therefore as on the one hand the ſubject is bound to yield obedience to the command of the ſheriff's known and ſworn bailiff, without the production of his warrant, ſo on the other the ſheriff is perſonally anſwerable for the acts of every ſuch officer within the ſcope of his general authority, without proof of his ſpecial commiſſion in the particular caſe. And this liability of the ſheriff is the ground of the obligation on the part of the ſubject. It is clear that the ſheriff's reſponſibility from the relation between him and his officers goes much beyond that of a maſter for the acts of his ſervant; for in the latter caſe the maſter is only anſwerable for his ſervant while acting within the ſcope of his particular buſineſs or commiſſion: but the ſheriff is liable for the wrongful acts of his bailiff acting under colour of his office. And this is founded upon the principle of public policy. For in the caſe of theſe officers the Public have not adequate means of knowing whether they are acting by the ſheriff's authority or not, and are obliged at their peril to yield a preſent obedience; therefore the ſheriff muſt be anſwerable at all events, and muſt afterwards indemnify himſelf againſt his officers, if they were in the wrong, by ſuch means as the law puts into his hands. For this purpoſe theſe officers give bonds to the ſheriff to indemnify him againſt all their wrongful acts. This was the ground of the determination in *Yabſley* v. *Doble* (*a*), where the under-ſheriff's confeſſion of an eſcape was held evidence of the fact in an action again the ſheriff, becauſe the under-ſheriff gives him a bond to ſave him harmleſs; and therefore in effect the confeſſion goes to charge himſelf. So here the under-ſheriff producing the bond of indemnity from *Sugden* to the ſheriff ſhews that the defendant is indemnified againſt *Sugden*'s acts; and therefore the loſs will ultimately fall upon *Sugden* himſelf, whoſe acts are now brought forward as evidence againſt the ſheriff. But 2dly, There is alſo evidence of privity between *Sugden* and the defendant in this particular caſe; for the officer produced a copy of the warrant at the time, under which he profeſſed to act by the ſheriff's command. And even in the caſe of a ſervant, if he have in his poſſeſſion as his authority for acting in the name of his maſter that which ordinarily he could only be poſſeſſed of by the delivery of the maſter, that would be at leaſt primâ facie evidence of his authority to bind the maſter. 12 *Mod*. 564. If this were not a copy of a true warrant, as it purported to be, it would have been very eaſy for the under-ſheriff to prove that no ſuch warrant had been iſſued by the ſheriff of which the paper delivered purported to be a copy: and the defendant's not having offered ſuch proof, it muſt be taken as an admiſſion of the fact that ſuch a warrant had iſſued. If it be ſaid that notice ought to have been given to the ſheriff to produce the original, the anſwer is that ſuch notice would have been nugatory; becauſe the original warrant muſt be taken to remain in the hands of the bailiff, who is bound to keep it for his own juſtification.

Cockell, Serjt. and *Chambre*, contrà. This is an action againſt the ſheriff in order to make him reſponſible for the act of another

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(*a*) 1 Ld. *Raym*. 190.

who, it is ſaid, acted under his authority. In this therefore as in other caſes of the like nature the authority muſt be proved by other evidence than the mere confeſſion of the agent, to which alone the evidence given amounts. In caſes of this ſort the conſtant practice has been to call upon the officer to produce the original warrant itſelf, which being the beſt evidence of the fact no other can be admitted, unleſs it is improperly withheld after notice to produce it. But it is ſaid that the ſheriff is reſponſible for the acts of his ſworn bailiff without ſhewing any warrant. The authorities however which have been cited by no means prove that poſition: but even if it were ſo, there is no proof in this caſe that *Sugden* was a ſworn officer of the defendant's. Then the indemnity bond is inſiſted on as a reaſon for admitting the evidence; but that does not apply to the objection, for by that bond *Sugden* only ſecures to the ſheriff that he ſhall duly execute all proceſs directed to him by the ſheriff; and there is no evidence that any proceſs was ſo directed to him in this inſtance. The caſe in Ld. *Raym.* is very diſtinguiſhable from the preſent; for it appears from the very ſtatutes which have been referred to that the under-ſheriff is the general ſervant of the ſheriff, appointed by him to execute his office of ſheriff: but a bailiff has no ſuch general authority from the ſheriff, but is ſpecially appointed by him to act on each occaſion of executing proceſs wherein he is concerned; and proceſs directed to one bailiff is no authority for another to act upon.

Lord KENYON, Ch. J. The caſe cited from 1 Ld. *Raym.* is the only one that affords any ground of argument for the plaintiff: but that is diſtinguiſhable from the preſent caſe for the reaſon given by the defendant's counſel. The under-ſheriff is the general deputy of the high-ſheriff for all purpoſes: but that is not the caſe with a bailiff. The plaintiff's argument aſſumes that the relation of maſter and ſervant was eſtabliſhed by the evidence: if it had been proved that that relation ſubſiſted, the conſequence contended for would have followed; but that was not proved. If however the reſt of the Court entertain any doubt, as this is a caſe of very extenſive conſequences, it may be further conſidered.

GROSE, J. I have always underſtood that there is a conſiderable difference between an under-ſheriff and a bailiff as to their liability: but the caſe cited from Ld. *Raymond* tends to ſhew that the bailiff is liable in all caſes in which the under-ſheriff is,

becauſe

becauſe he alſo gives a bond to the ſheriff. I wiſh therefore to have an opportunity of looking into the caſes.

Lawrence, J. It is of great importance to the ſheriff to know for what acts and to what extent he is anſwerable for the acts of his bailiffs. The caſe in Ld. *Raymond* ſeems to have proceeded on the ground of the indemnity which the under-ſheriff gave, by virtue of which his confeſſion was in effect received againſt himſelf; and the ſame argument would alſo apply to the bailiff. But I do not feel the ſtrength of that argument; it does not follow that, becauſe he charges himſelf, the ſheriff has a remedy over, for perhaps the ſheriff may ſuffer much beyond the extent of the indemnity. The admiſſion of the under-ſheriff may affect the high-ſheriff, becauſe he is the general officer of the ſheriff: but I do not think that the bailiff is his general officer. The bailiff gives a bond to execute ſuch warrants as ſhall be directed to him; when a warrant is granted to him, he becomes the ſpecial officer of the ſheriff; and I have always underſtood it to be neceſſary to produce the warrant to ſhew that relation between them. But the objection here is that it did not appear that the ſheriff had granted any warrant to this officer, the original warrant not being produced and no notice having been given to produce it.

The Court, after a ſhort conference among themſelves, made

The rule abſolute.

Doe on the Demiſe of Forster *againſt* Wandlass.

Tueſday, Jan. 31ſt.

Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unleſs he demand the rent on the day when it becomes due; nor under the ſtat. 4 *Geo.* 2. *c.* 28. *ſ.* 2. if there be a ſufficient diſtreſs on the premiſes.

Ejectment for lands in the county of *Durham*, which the leſſor of the plaintiff held under a leaſe from the Dean and Chapter of *Durham*, and which had been under-let by him to the defendant by an indenture of demiſe dated the 16th *January* 1795 for a term yet unexpired, reſerving rent, in which was contained the following proviſo; "That if it ſhall "happen that the ſaid yearly rents hereby reſerved or any part "thereof ſhall be behind and unpaid by the ſpace of thirty days "next after the ſaid days of payment, &c. contrary to the true "intent and meaning of theſe preſents; or in caſe the ſaid de"fendant his executors, &c. ſhall at any time during the ſaid "term alien, &c; then and in either of ſuch caſes it ſhall and "may be lawful for the ſaid *J. Foſter* his executors, &c. into the

"ſaid

1797.

Doe dem. Forster *againſt* Wandlass.

"ſaid demiſed premiſes to re-enter, &c." There was alſo a covenant on the part of the defendant to pay rent, &c. &c.

On the trial the plaintiff proved a demand of half a year's rent after the day on which it was due, and a refuſal on the part of the defendant to pay it, before the re-entry. But it was agreed on both ſides, that there was a ſufficient diſtreſs on the premiſes during the whole time. On the part of the defendant it was objected at the trial that the leſſor of the plaintiff could not recover either at common law, or under the ſtatute of the 4 *Geo.* 2. *c.* 28. *ſ.* 2; not by the former, becauſe the rent was not demanded on the day when it became due; *Co. Lit.* 201.; 7 *Rep.* 28.; nor by the latter, becauſe there was a ſufficient diſtreſs on the premiſes. On the other hand the plaintiff's counſel relied on the expreſs covenant of the defendant, that the leſſor ſhould re-enter upon the event which had happened, namely, the non-payment of rent when it became due. And to this opinion *Lawrence*, J. inclined at the trial, and directed a verdict for the plaintiff. But upon reporting the caſe, upon a motion for a new trial, he ſaid that upon re-conſideration of the queſtion he was not ſatisfied with his former opinion. And he referred to 7 *Co.* 28. where the diſtinction is taken that upon a diſtreſs for non-payment of rent a demand at the day is not neceſſary as it is in caſe of a re-entry, where the whole intereſt or eſtate is defeated, or where any ſum nomine pœnæ is forfeited; in both which caſes the demand ought to be made preciſely at the day a convenient time before ſun-ſet; in the one caſe in reſpect of the condition, and in the other in reſpect of the penalty. But in the caſe of a diſtreſs he who hath the rent may demand it at what time he will; for no loſs or penalty will thereon enſue, but only a remedy to come at his rent in arrear [(a)].

Law and *Holroyd* ſhewed cauſe againſt the rule for ſetting aſide [(b)] the verdict. The preſent caſe is diſtinguiſhable from that in 7 *Co.* 28. and from *Co. Lit.* 201. What is there ſaid applies only to the caſe of a reſervation of rent, and to a clauſe of re-entry for non-payment purſuant to the reddendum; in which caſe the obligation of payment is not perſonal, but the rent is in the realty; and the leſſor cannot re-enter without obſerving ſtrictly all the niceties required by the common law. And that doctrine proceeds upon the principle of the eſtate's being granted upon a condition, in which caſe it muſt be admitted that the grantor who would take advantage of the condition in order to defeat the eſtate of the grantee muſt proceed ſtrictly in the manner pointed out by the law, for the reaſon mentioned; and therefore if the plaintiff had reſted merely upon the obligation ariſing out of the reddendum clauſe, the objection might have applied. But here is an expreſs covenant to pay rent, which is a perſonal covenant not running with the land, nor a condition annexed to the eſtate, but independent thereof; and the proviſo for re-entry in caſe of the breach of this covenant operates rather in the nature of a limitation of the original eſtate, that it ſhould continue ſo long only as the leſſee ſhould pay his rent on the days when it became due, and is rather to be conſidered as part of the original and mutual agreement between the parties, than as a ſubſequent condition which is to defeat a larger eſtate by way of forfeiture. Neither is this proviſo for re-entry confined to the non-payment of rent only but it extends to non-performance of ſeveral covenants, one of them indeed being for payment of the rent at the times mentioned. And as no demand would have been neceſſary if the leſſee had aliened or aſſigned, neither can it be neceſſary in this caſe. In 5 *Co.* 40. *b.* it is reſolved that by ſpecial conſent of the parties a re-entry may be for default of payment of rent without demand of it (*a*). The diſtinction before alluded to is taken in *Finch* v. *Throckmorton* (*b*); where in ejectment the defendant ſet forth a leaſe of the premiſes granted by the crown to his anceſtor for ſeventy years: The plaintiff replied that the leaſe was rendering rent at *Michaelmas* and at the Annunciation by equal portions; with a proviſo, that if the rent were in arrear for one month, &c. the leaſe ſhould be void; and then averred that the rent was in arrear for one month and upwards, upon which the Crown granted the lands to the plaintiff; to which it was rejoined that the rent was afterwards paid by the defendant and accepted by the officers of the Crown: and on demurrer it was held that this proviſo operated as a limitation and not as a condition, although the words were words conditional, and that they ought to be interpreted as if the leaſe had been for ſo many years, if the leſſee ſhould ſo long pay the rent; for when by the expreſs agreement in

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(a) Vid. *Dy.* 51. *b.* 68. *a. b.* and *Goodright* v. *Cator, Dougl.* 485.

(b) The motion was at firſt made to ſet aſide the verdict: but as there was a part of the premiſes which the leſſor of the plaintiff was at all events entitled to recover, the rule was afterwards made to confine the execution to ſuch part.

(*a*) Vid. *Umphery* v. *Damyon*, 1 *Bulſt.* 181.

(*b*) *Moor* 291.

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in the leaſe it is to be void upon a certain event, although it is ſo ſtated in words conditional, it creates a limitation, and cauſes the eſtate to ceaſe without entry. And ſo it is where the eſtate is to be at an end upon the happening of any collateral thing. The ſame doctrine was laid down by *Hervey*, J. in *Chaloner* v. *Ware* (*a*). In the caſe of a bond conditioned for performance of covenants in a leaſe, one of which is the payment of rent on the days reſerved, if the payment were omitted there is no doubt but that the bond would be forfeited though no demand were made. *Andrews* v. *Wood*, *Cro. Eliz.* 332 (*b*). There is no difference between that and the caſe of an expreſs covenant. As in 1 *Rol. Abr.* 459. *pl.* 7. where a man leaſes to another reſerving rent, and the leſſee covenants to pay the rent at a certain day, he ought to pay it without any demand at his peril. *Godb.* 95. Now here there was a demand of the rent made before re-entry, though not made on the very day on which it became due.

Cockell, Serjt. and *Wood*, contrà, ſaid that there were many authorities, in addition to thoſe already mentioned, to ſhew that at common law a demand of rent was neceſſary to be made at the day, and on the land, before a re-entry. *Bro.* tit. *Demand*, *pl.* 19. *Co. Lit.* 201. *Cro. Eliz.* 73. 4 *Leon.* 180. And that not having been done here there could be no re-entry as at common law. Neither could it be made by virtue of the ſtat. 4 *Geo.* 1. which is confirmatory of the common law as laid down in the authorities before mentioned. For that ſtatute only gives the right to re-enter when no ſufficient diſtreſs is to be found upon the premiſes; and it was incumbent on the plaintiff to prove that there was not any ſuch in order to eſtabliſh his right under the ſtatute.

Lord Kenyon, Ch. J. I think there has been ſome confuſion in the argument on behalf of the plaintiff. There are caſes in the books to this effect; where a leaſe is made for a term of years, determinable on ſuch a thing being done, it determines when that thing is done in the caſe of a chattel intereſt: in the caſe of a freehold leaſe it is only voidable, and ſomething muſt be done by the leſſor to ſhew his election to put an end to it. And ſome of the caſes cited perhaps went on that ground. But this queſtion ariſes on a power to re-enter. Now at common law great niceties were required in ſuch a caſe; and it was to do away the neceſſity of complying with thoſe requiſites that the

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(*a*) *Hetl.* 77. (*b*) Sed vid. *Specot* v. *Sheres*, *Cro. Eliz.* 828. and 1 *Rol. Abr.* 460. *pl.* 10.

act of parliament was paſſed. But this ſhews that all thoſe niceties required by the common law muſt have been purſued before the act; and the ſtatute does not apply to this caſe, becauſe there was a ſufficient diſtreſs on the premiſes. Therefore the plaintiff muſt reſort to his right at common law; and not having complied with the requiſitions of the common law, he cannot recover.

Rule abſolute.

JACKSON *againſt* WARWICK.

Tueſday, Jan. 31ſt.

No action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice fee with his ſon who was to be bound to the plaintiff, if it appear that the indenture executed was void by the ſtat. 8 *Ann*, *c.* 9. for want of the inſertion of ſuch premium therein, and a proper ſtamp in reſpect of the ſame; although the plaintiff did in fact maintain the apprentice for ſome time, and until he abſconded.

THIS was an action on a promiſſory note for 10*l.* payable on or before the 14th *Feb.* 1793, which was given by the defendant as an apprentice fee with his ſon *T. W.* to the plaintiff to whom the ſon was bound. The indentures were not produced at the trial, and were ſtated to be loſt; but there was evidence to ſhew that there was no mention made therein of this premium having been given with the apprentice, nor any ſtamp thereon in proportion to the value, as required by the ſtatute 8 *Ann*, *c.* 9. in default of which by the 39th ſection of the act the indentures are declared to be void and unavailable to any purpoſe. The apprentice remained ſome part of his time with his maſter, and then abſconded. At the trial at the laſt aſſizes at *Carliſle* before *Lawrence*, J. it was objected that, the indentures being void for this defect, the conſideration of the note had failed, and that the plaintiff ought to be nonſuited. To this it was anſwered that the avoiding of the indentures could not collaterally affect this note; but that at all events it was ſufficient if there were any conſideration to ſuſtain it; and here the maſter had provided board and lodging for ſome time for the apprentice, which was in itſelf a ſufficient conſideration. But **Lawrence**, J. was of opinion that the conſideration was entire, and that it had wholly failed. However he ſuffered a verdict to be taken for the plaintiff for 10*l.*, with liberty for the defendant to move to enter a nonſuit. And

Lambe having obtained a rule niſi to that effect in the laſt term,

Chambre now ſhewed cauſe againſt it. The objection does not ariſe on the face of the note, which is an abſolute one for the payment of the money. All that appears is that in fact the duty

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Jackson *againſt* Warwick.

duty was not paid at the time of executing the indentures: but non conſtat that the maſter might not have got them ſtamped afterwards on payment of the duty. [It was obſerved in anſwer by the Court, that the time for getting them ſtamped had expired before the action was commenced.] At any rate it is a queſtion entirely collateral to the note, and if there be any conſideration left to eſtabliſh that, it is ſufficient. And here the maſter maintained the apprentice for ſome time before he abſconded, which is a good conſideration, and was in the contemplation of the parties at the time when the note was given.

Lambe in ſupport of the rule was ſtopped by the Court.

Lord Kenyon, Ch. J. The note was given in conſideration of the relation of apprenticeſhip which theſe parties ſuppoſed was to be created between the defendant's ſon and the plaintiff, which relation it now appears never did exiſt between them; and therefore the conſideration for the note wholly fails. By the ſtatute of *Ann* the duty is laid upon the maſter in conſideration of the premium received by him; and therefore he ought to have taken care that the conſideration was inſerted in the indenture, and that it was properly ſtamped, the time for doing which is now expired. But be that as it may, we can only look to the conſideration at the time of bringing the action; and at that time it appears that the indenture was not ſtamped.

Per Curiam, A nonſuit to be entered.

Tueſday, Jan. 31ſt.

Stamper *againſt* Milbourne.

No action can be maintained againſt the ſheriff for not aſſigning a bail-bond, if the bond be cancelled on the defendant's returning into cuſtody before the return of the writ.

THIS was an action on the caſe againſt the defendant, ſheriff of the county of *Cumberland*, for not aſſigning a bail-bond taken by him in an action brought by the plaintiff againſt *J. Chalmers*. On the trial at the laſt aſſizes for *Cumberland* before *Lawrence*, J. it appeared that the defendant, after having arreſted *Chalmers*, let him out of cuſtody in order to perform his duty as a diſſenting miniſter, taking a bail-bond; that *Chalmers* returned into the defendant's cuſtody before the return of the writ, and continued in his cuſtody until he was ſuperſeded for want of a declaration againſt him by the plaintiff; and that the bail-bond was cancelled before the return of the writ. It was objected, on behalf of the defendant, that as *Chalmers* was in cuſtody at the return of the writ this action could not be maintained, the plaintiff not having ſuſtained any injury by *Chalmers* being at large before the return of the writ; and the caſe of *Plank* v. *Anderſon*, *ante*, 5 vol. 37. was referred to. The plaintiff's counſel relied on *Harriſon* v. *Davies*, 5 *Burr.* 2683. to ſhew that the ſheriff, after taking a bail-bond, could not cancel it on account of the defendant's being in cuſtody at the return of the writ, for that nothing was a performance of the bail-bond but putting in bail above. But the learned Judge was of opinion, on the authority of *Jones* v. *Lander*, *ante*, 6 vol. 753, that the plaintiff could not recover: however he ſuffered the cauſe to proceed, giving the defendant leave to move to enter a nonſuit; and the jury gave a verdict for the plaintiff, with one farthing damages.

A motion having been made in the laſt term to enter a nonſuit, *Law* and *Holroyd* now ſhewed cauſe againſt it; again relying on *Harriſon* v. *Davies*, and obſerving that on the ſheriff's taking a bail-bond the plaintiff's right to have it aſſigned attached; the words of the ſtatute 4 *Ann*, *c.* 16. *ſ.* 20., being peremptory, that the ſheriff *ſhall* aſſign the bail-bond; and that it was only decided in *Jones* v. *Lander* that under thoſe circumſtances the Court would not rule the ſheriff to bring in the body, not that the plaintiff cannot maintain this action.

But *The Court* (ſtopping *Wood* and *Chambre* contrà) were clearly of opinion that, according to the caſe of *Jones* v. *Lander*, if the party return into the ſheriff's cuſtody before the return of the writ, the bail-bond may be cancelled and conſidered as if it had never been given; the great object being to compel an appearance at the return of the writ. That the plaintiff in this caſe was not damnified by the act of the ſheriff; for that if he had any cauſe of action againſt *Chalmers* he might have proceeded to judgment againſt him while in cuſtody, inſtead of which he had ſuffered him to be ſuperſeded for want of a declaration. And that the ſtat. 4 *Ann* only meant that the ſheriff ſhould be compelled to aſſign ſuch bail-bonds as were effectual; whereas this was given up before the return of the writ and treated as a nullity. And they made the rule abſolute to enter a

Judgment of nonſuit.

1797.

Wedneſday. Feb. 1ſt.

A bond dated on a day certain in a penal ſum conditioned for payment of a leſſer ſum generally, without naming any day of payment, is payable on the day of the date; and upon any action brought upon it, the Court will refer it to the Maſter to compute principal intereſt and coſts thereon, and on payment of the ſame ſtay the proceedings, by virtue of the 4 *Ann*, c. 16. *ſ.* 13. Intereſt is due on ſuch bond though not expreſsly reſerved.

Farquhar, Bart. *againſt* Morris.

DEBT on bond dated on a day certain in the penal ſum of 800*l.* conditioned to pay 400*l.* but no day of payment was expreſsly named, nor intereſt reſerved in terms. The defendant, before plea pleaded, obtained a rule of reference to the Maſter, grounded upon the 4 *Ann*, *c.* 16. *ſ.* 13. to compute what was due for principal intereſt and coſts, and on payment of the ſame to ſtay the proceedings. The Maſter doubted whether he was authoriſed to proceed in this inquiry, becauſe the 12th ſection of the act ſpeaks only of "any bond which hath a condition or "defeazance to make void the ſame upon payment of a leſſer "ſum at *a day* or *place certain*;" and the 13th ſection, upon which the rule was obtained, is confined to "any *ſuch* bond." And here there was no day certain mentioned for the payment of the money. It was therefore now moved on the part of the defendant by

Perceval and *Wood* that the Maſter might be directed to proceed under the former rule. And they mentioned *Bonafous* v. *Rybot*, 3 *Burr*. 1370. where Ld. *Mansfield* ſaid that the act of parliament, being merely confirmatory of the original juriſdiction of the Court, ought to have the moſt liberal conſtruction, for the eaſier ſpeedier and better advancement of juſtice.

Gibbs contrà relied on the ſtrict words of the act, contending that it only related to bonds conditioned for payment on a day certain expreſsly named therein.

Per Curiam. This bond is payable at a day certain; for it is payable on the day of the date, no other time being mentioned for payment.

The plaintiff's counſel then inſiſted that he was entitled to intereſt; which was oppoſed by the counſel for the defendant, on the ground that none was reſerved, and therefore it muſt be taken that none was intended to be paid. And that even if the bond were payable on demand, a demand was neceſſary to entitle the plaintiff to intereſt. But

Per Curiam. There is no doubt but that intereſt is payable from the time of payment, namely, from the date, though not expreſsly reſerved.

Referred to the Maſter accordingly.

MORTON *againſt* LAMB.

Wedneſday, Feb. 1ſt.

In an action for the non-delivery of corn at *S.* purſuant to an agreement whereby the defendant, in conſideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at *S.* within one month from the time of the ſale, the plaintiff muſt aver a tender of the price or what is equivalent thereto; for the delivery of the corn and the payment of the price were concurrent acts to be done by the parties reſpectively at the ſame time; and each muſt aver performance or an offer to perform his part before he can maintain an action againſt the other.

IN an action on the caſe the plaintiff declared againſt the defendant for that whereas on the 10th *Feb.* 1796, at *Mancheſter* in the county of *Lancaſter*, in conſideration that the plaintiff, at the ſpecial inſtance and requeſt of the defendant had then and there bought of the defendant 200 quarters of wheat at 5*l.* 0*s.* 6*d. per* quarter, ſuch price to be therefore paid by the plaintiff to the defendant, he the defendant undertook and then and there promiſed the plaintiff to deliver the ſaid corn to him (the plaintiff) at *Shardlow* in the county of *Derby* in one month from that time, *viz.* of the ſale; and then he alleged that although he (the plaintiff) always from the time of making ſuch ſale for the ſpace of one month then next following and afterwards was ready and willing to receive the ſaid corn at *Shardlow*, yet the defendant not regarding his ſaid promiſe &c. did not in one month from the time of the making of ſuch ſale as aforeſaid or at any other time deliver the ſaid corn to the plaintiff at *Shardlow* or elſewhere, although he (the defendant) was often requeſted ſo to do, &c. The defendant pleaded the general iſſue; and at the trial the plaintiff recovered a verdict.

Holroyd obtained, in the laſt term, a rule calling on the plaintiff to ſhew cauſe why the judgment ſhould not be arreſted, becauſe it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He ſaid this was neceſſary on the principle eſtabliſhed in many caſes, particularly in *Thorpe* v. *Thorpe* (*a*), *Callonel* v. *Briggs* (*b*), *Kingſton* v. *Preſton* (*c*), *Jones* v. *Barclay* (*d*), and *Goodiſon* v. *Nunn* (*e*), that when ſomething is to be done by both parties to a contract at the ſame time, as in this caſe the tendering of the money and the delivery of the corn, there the party ſuing the other for non-performance of his part muſt aver an offer at leaſt at the ſame time to perform what was to be done by himſelf.

Law, *Wood*, and *Scarlett*, now ſhewed cauſe. The covenants here are mutual and independent, and each party has a remedy

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(*a*) *Salk.* 171.
(*b*) *Ib.* 113.
(*c*) *Dougl.* 3d. Ed. 688.
(*d*) *Dougl.* 3d Ed. 684.
(*e*) *Ante*, 4 vol. 761.

MORTON *againſt* LAMB.

by action againſt the other for non-performance of his part. But if there be any precedence between them, the delivery of the goods ought, in the regular order of things, to precede the payment of the price. In neither caſe can the averment contended for be neceſſary. The diſtinction is taken in many caſes that where two things are to be done, and the time of doing it is mentioned for one and not for the other, there the thing for doing which the time is ſtipulated muſt be done firſt, and ſo averred to be. *Pafford* v. *Webbe*, 2 *Rol. Rep*. 88. *Pordage* v. *Cole*, 1 *Saund*. 319. *Peters* v. *Opie*, 2 *Saund*. 352. 1 *Ventr*. 177. 214. *Elwick* v. *Cudworth*, 1 *Lutwich* 493. *Hilton* v. *Smith*, *ib*. 496. So in *Thorpe* v. *Thorpe* (*a*), it was ſaid by *Holt*, Ch. J. that if by the agreement a day certain is appointed for the payment of money, and this day is to happen before the act can be performed for which the money is to be paid, there although the words are that he ſhall pay ſo much *for* the performance of the act, yet after the day appointed the party ſhall have his action for the money before the thing is performed. And that is a ſtronger caſe than the preſent, becauſe the act for which the recompenſe is to be given ought in reaſon to precede the recompenſe itſelf. In *Blackwell* v. *Naſh* (*b*), the plaintiff declared in debt for a penalty on a covenant that he ſhould transfer ſo much ſtock to the defendant on or before the 21ſt *September*, and that the defendant in conſideration of the premiſes covenanted to accept and pay for it; and then the plaintiff averred that he was ready and offered to transfer the ſtock on that day, but that the defendant refuſed to accept or pay for it: It was objected in arreſt of judgment that the actual transfer of the ſtock was a condition precedent which ought to have been averred: But the Court held that "*in conſideration of the premiſes*" meant in conſideration of the *covenant* to transfer, and not of an *actual* transferring, for which the defendant had his remedy; though if it did mean the latter, a tender and refuſal would amount to performance. And they added that in all ſuch caſes the great queſtion was, *who was to do the firſt act?* But that where the transfer was to be *upon payment*, there was no colour to make the transfer a condition precedent. The ſame doctrine was held in *Dawſon* v. *Myer* (*c*). Theſe caſes went on the ground that the parties had mutual remedies on their reciprocal promiſes, and therefore there was no need of the averment contended for. But the caſe of *Merrit* v. *Rane* (*d*) applies as ſtrongly in another point of

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(*a*) 1 *Salk*. 171. 1 *Lutw*. 250. S. C. (*b*) 1 *Stra*. 535. (*c*) 1 *Stra*. 712. (*d*) 1 *Stra*. 458.

of view. There the plaintiff declared on an agreement that in conſideration of 252 *l.* paid to the defendant he agreed to transfer 6000 *l.* *South-ſea* ſtock to the plaintiff or his executors, &c. at any time before the 9th *January* 1720, within three days after demand in writing, upon payment of the further ſum of 9000 *l.* then he averred the demand in writing, and that he attended on the day, but that the defendant did not appear to transfer: One of the objections was, that the plaintiff had not averred that he had the money there on the day to have paid upon the transfer: But the Court ſaid that as to the plaintiff's not ſhewing a tender that ought to have come from the defendant by way of excuſe, that he was there ready to have transferred if the plaintiff had been there to have paid the money. To apply therefore the reaſoning of all theſe authorities to the preſent caſe:—Here the firſt act to be done was by the defendant, namely, the carrying of the corn to *Shardlow*; by not doing which he broke his agreement, and a cauſe of action accrued to the plaintiff according to that claſs of caſes, wherein agreements of this ſort have been conſtrued to give mutual remedies to the parties. But admitting that he was not bound to deliver the corn there until the plaintiff was prepared to pay for it; ſtill that ought to come from the defendant by way of excuſe, and the tender of payment was not neceſſary to be averred by the plaintiff as a condition precedent to the right of action. The defendant might have ſhewn in excuſe for the non-performance on his part, either that he carried the corn to the place, and was ready to have delivered it, but that the plaintiff was not there to receive it; or that the plaintiff refuſed to receive it; or that he was not ready to pay for it. *Lancaſhire* v. *Killingworth*, 12 *Mod.* 531. *Salk.* 623. *Ughtred*'s caſe, 7 *Co.* 10. Where an action is brought for money due, the defendant may ſhew in his defence a tender and refuſal, or that he was prepared at the day and place appointed to pay the money, but that the plaintiff was not there to receive it; yet it never was held neceſſary for the plaintiff to aver in his declaration that he was ready to receive it. And here, if the readineſs to pay had been averred, it could have anſwered no purpoſe; becauſe no iſſue could have been taken on it. Beſides in no caſe is tender of payment neceſſary to be averred when the contract is executory, as it is in this caſe; for there the parties neceſſarily rely upon the mutual remedies ariſing out of it; they give mutual credit to each other. All the caſes cited on the other ſide are, if ſtrictly conſidered, caſes of

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MORTON *againſt* LAMB.

of condition precedent. Several of them, as well as the ſubſequent caſes of *Campbell* v. *Jones* (*a*), and *Porter* v. *Shepherd* (*b*), laid down the rule that whether covenants be or be not independent on each other muſt depend on the good ſenſe of the thing; that is, who in the fair ſenſe and meaning of the parties was required to do the firſt act. Now here there is no doubt that the firſt act was to be done by the defendant, which he neglected to do: and it would be abſurd to require a perſon to pay for goods before he had received them; though if he were not ready to pay for them at the time when the other was ready to deliver them, that might be a reaſon for the non-delivery. But ſtill that is only matter of defence and excuſe on the part of the defendant, which it is incumbent on him to ſhew. And yet the effect of the averment required is, that the plaintiff was bound to tender the price before the goods were even offered to him.

Holroyd contrà. This action is not brought againſt the defendant for having omitted to carry the corn to *Shardlow*, even allowing that to be the firſt act to be done; and therefore much of the plaintiff's argument does not apply. But the ground of complaint is that it was not delivered to him there; and conſequently upon this form of declaring it may be aſſumed that the defendant did carry the corn there. The queſtion then comes to this, whether the defendant was bound to deliver his corn, the plaintiff not being there ready to pay for it. For if not, then it follows, according to all the late determinations, that he ought to have averred a tender of the price, or that he was there ready to pay for it, if the defendant had been there ready to receive it, and deliver the corn. And for this purpoſe it is not neceſſary to ſhew that the tender of the price was a condition precedent, ſtrictly ſo conſidered; for according to *Goodiſſon* v. *Nunn* (*c*), and *Kingſton* v. *Preſton* (*d*), if the acts are concurrent and in the nature of the tranſaction to be done at the ſame time, before one of the parties can maintain an action againſt the other for the non-performance of his part, he muſt aver that he performed or was ready to perform every thing on his own part. *Callonel* v. *Briggs* (*e*) is in point. That was an executory agreement, like the preſent, to pay ſo much money ſix months after the bargain, the plaintiff transferring ſtock. There Lord *Holt* ſaid "if either party would ſue upon this agree-

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(*a*) *Ante*, 6 vol. 570.
(*b*) *Ib*. 665.
(*c*) *Ante*, 4 vol. 761.
(*d*) *Dougl*. 3d ed. 688.
(*e*) *Salk*. 113.

"ment,

"ment, the plaintiff for not paying, or the defendant for not "transferring, the one muſt *aver* and prove a transfer or a tender, "and the other a payment or a tender; and this," ſays he, "though "there be mutual promiſes. If I ſell you my horſe for 10 *l.*, "if you will have the horſe, I muſt have the money; or if I "will have the money, you muſt have the horſe." Or according to *Lancaſhire* v. *Killingworth* (*a*), the plaintiff ſhould have averred that he was ready at the place to have received the corn on the laſt day of the time within which it was to be delivered, and ready and willing to have paid the price; but that no perſon was there on the part of the defendant to deliver the corn. The delivery of the corn, and the payment of the price, were concurrent acts to be done by the parties at the ſame time, the one depending on the other; and if ſo, then within the principle of all the modern caſes, the plaintiff ought to have averred in his declaration a tender of the price, for want of which it is bad.

Lord KENYON, Ch. J. If this queſtion depended on the technical niceties of pleading, I ſhould not feel ſo much confidence as I do: but it depends altogether on the true conſtruction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at *Shardlow* within a certain time; and there can be no doubt but that the parties intended that the payment ſhould be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to *Shardlow*, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and ſays "I did not deliver the corn "to you (the plaintiff), becauſe you do not ſay that you were "ready to pay for it; and if you were not ready, I am not bound "to deliver the corn;" and the queſtion is, whether that ſhould or ſhould not have been alleged. The caſe decided by Lord *Holt*, in *Salk.* 112., if indeed ſo plain a caſe wanted that authority to ſupport it, ſhews that where two concurrent acts are to be done, the party who ſues the other for non-performance muſt aver that he had performed, or was ready to perform, his part of the contract. Then the plaintiff in this caſe cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of juſtice, muſt ſhew that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condi-

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(*a*) *Salk.* 623.

tion precedent, and ſome caſes have been cited to prove it: but they do not appear to me to be applicable. In the one in *Saunders* (*a*), the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the caſe in *Salk.* 171. where work was to be done, and then the workman was to be paid. And in ordinary caſes of this kind the work is to be done before the wages are earned: but thoſe caſes do not apply to the preſent, where both the acts are to be done at the ſame time. Speaking of conditions precedent and ſubſequent in other caſes only leads to confuſion. In the caſe of *Campbell* v. *Jones*, I thought, and ſtill continue of that opinion, that whether covenants be or be not independent of each other muſt depend on the good ſenſe of the caſe, and on the order in which the ſeveral things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the ſame time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action againſt the defendant for not delivering it.

Grose, J. It is difficult to reconcile all the caſes in the books on the ſubject of conditions precedent; but the good ſenſe to be extracted from them all is, that if one party covenant to do one thing in conſideration of the other party's doing another, each muſt be ready to perform his part of the contract at the time he charges the other with non-performance. Here the queſtion is, what was the intention of the parties; they clearly intended that ſomething ſhould be done by each at the ſame time. The corn was to be delivered at *Shardlow* to the plaintiff for a certain price *to be therefore paid* by him, that is, at the time of the delivery; then the readineſs to pay ſhould have been averred by the plaintiff.

Lawrence, J. It has been argued, on behalf of the plaintiff, that this muſt be conſidered as a declaration on mutual promiſes, and that as this is a demand on the defendant on the ground of ſome mutual promiſe made by him, and which was the conſideration of the plaintiff's promiſe, it was not neceſſary to aver performance on his part: but if ſo, the declaration is not adapted to the truth of the caſe, in not ſtating that the defendant's promiſe

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(*a*) 2 *Saund.* 350.

was in conſideration of the plaintiff's. But on this declaration I can only conſider it as an agreement by the defendant to deliver the corn at *Shardlow* on being paid for it. The payment of the money was to be an act concurrent with the delivery; and then the caſe is like that of *Callonel* v. *Briggs*, which was on an agreement to pay ſo much money ſix months after the bargain, the plaintiff transferring ſtock; and there Lord *Holt* ſaid, “If either “party would ſue upon this agreement, the plaintiff for not paying, “or the defendant for not transferring, the one muſt *aver* and prove “a transfer or a tender:” he did not ſay, that the not doing it ſhould come from the defendant by way of excuſe, but that the doing it muſt be alleged in the declaration; and that affords an anſwer to great part of the argument urged on behalf of the defendant in this caſe. The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he muſt ſet out the whole of his title. The ſtrongeſt caſe cited for the defendant was that of *Merrit* v. *Rane* (*a*): but that does not appear to me of ſufficient weight to overturn the authority of the caſe of *Callonel* v. *Briggs*. I do not quite underſtand what the Court there ſaid, that it was not neceſſary to allege a tender, for that it ſhould have come from the defendant by way of excuſe; for as it was ſtated that the plaintiff's agent was ready to receive a transfer of the ſtock, but that the defendant did not attend, it would have been abſurd to ſtate a tender of the money to a perſon who was not preſent to receive it. There is however another caſe, not referred to in the argument, *Lea* v. *Exelby* (*b*), which is an authority to ſhew that the plaintiff in this caſe ſhould have averred a tender. There the plaintiff declared that in conſideration that he had promiſed to pay the defendant (who was poſſeſſed of a leaſe for years, the inheritance of which was in the plaintiff) a certain ſum on ſuch a day, the defendant promiſed on payment to ſurrender to him the leaſe; and that he had tendered the money at the time, but that the defendant had not ſurrendered; and on motion in arreſt of judgment, becauſe it was not alleged that the defendant refuſed as well as that the plaintiff tendered, the Court held that the declaration was bad for that reaſon. Therefore, on the authority of that caſe, and of that of *Callonel* v. *Briggs*, I am of opinion that the declaration cannot be ſupported, and that the judgment muſt be arreſted.

Rule abſolute.

(*a*) 1 *Stra.* 458.

(*b*) *Cro. Eliz.* 888.

Wedneſday, Feb. 1ſt.

TOMLINSON and Another *againſt* BLACKSMITH.

Leave granted upon the application of the plaintiff to amend the declaration after verdict, by encreaſing the damages laid, according to the truth of the caſe as found by the jury, the former verdict being at the ſame time ſet aſide, and a new trial granted to enable the defendant to make his defence to the demand ſo enlarged.

THE declaration ſtated that on 10th *Auguſt* 1795, in conſideration that the plaintiffs at the ſpecial inſtance of the defendant had before that time ſold 150 quarters of wheat to the defendant for the price of 8 *l.* 4 *s.* per quarter, to be delivered to him at *Ferreby* ſluice in the county of *Lincoln* free on board ſuch veſſels as the defendant ſhould direct, and alſo in conſideration that the plaintiffs at the ſpecial inſtance of the defendant would not deliver the ſame wheat nor inſiſt upon the defendant's accepting the ſame at *Ferreby* ſluice, but would ſend the ſame to Meſſrs. *G. S.* and Co. in *London* to be by them ſold, the defendant promiſed the plaintiffs to pay them all the expences they ſhould incur in ſending the ſame to *London*, and alſo pay them the difference between the amount of the ſum for which the wheat was ſold by the plaintiffs to the defendant, and the ſum for which it ſhould be ſold in the *London* market. The plaintiffs then averred that the wheat was ſent to *London* accordingly, was there ſold for 500 *l.*, that the expences the plaintiffs were put to in ſo ſending it amounted to 200 *l.*, and that the difference between the amount of the original price agreed on and that for which the wheat was ſold in *London* was 730 *l.* There were alſo common counts for goods ſold and delivered, bargained and ſold &c, to the amount of 1200 *l.*; concluding to the plaintiffs' damage of *one hundred* pounds. This was evidently a miſtake, the damage intended to be laid being *one thouſand* pounds. The miſtake however was not diſcovered until after the trial, and after the jury had found a verdict of 611 *l.* 9 *s.* 6 *d.* The verdict was thereupon entered for that ſum upon all the counts but the firſt, and a verdict was entered for the defendant on that count.

Chambre obtained a rule calling on the defendant to ſhew cauſe why the plaintiffs ſhould not be at liberty to amend their declaration by altering the damages laid, from one hundred to one thouſand pounds, agreeably to the bill filed, or why the verdict ſhould not be ſet aſide and a new trial had, and then the plaintiffs be at liberty to make the ſame amendment. He preſſed the former part of the rule on the ground that it was never too late to amend where there was any thing to amend by (*a*), as in the preſent

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(*a*) Vid. *Green* v. *Rennet*, *ante*, 1 vol. 783.

ſent caſe. The miſtake palpably appeared upon the face of the declaration itſelf, wherein the damage ſuſtained by the plaintiffs appears upon calculation to amount to near 1000*l.* And he cited *Wilder* v. *Handy* (*a*), *Marſhall* v. *Riggs* (*b*), and *Dennis* v. *Edwards* (*c*), where the Court after verdict amended certain defects, for which judgment would otherwiſe have been arreſted.

Dayrell, contrà, objected to the amendment propoſed, at leaſt without ſending the cauſe down to trial again; otherwiſe the defendant, who might have an anſwer as to any damages beyond 100*l.*, would be deprived of the opportunity of making his defence. As the record now ſtood, if the plaintiffs entered up judgment for more than 100*l.* it would be error: 1 *Bulſt.* 49.

Lord KENYON, Ch. J. It would be going too far to make the amendment required, without ſending the cauſe to a new trial; as the defendant might have gone to trial relying that no more than 100*l.* damages could be recovered againſt him.

Per Curiam, Rule abſolute for ſetting aſide the verdict and granting a new trial, and for making the amendment propoſed.

(*a*) 2 *Stra.* 1151. (*b*) *Ib.* 1162. (*c*) *Comb.* 4.

The KING *againſt* The Inhabitants of STORRINGTON.

Saturday, Feb. 4th.

A father, mother, and two younger children having been removed from *A.* to *B.*, *B.* granted a certificate to *A.* mentioning the father, mother, and thoſe two younger children: Held that the certificate did not include an elder child of the age of 14, who at the time of the removal was maintaining himſelf by his own labour, and paying for board in his father's houſe; it being ſtated that at the time of the removal the pariſh officers of *A.* did not wiſh to remove that child becauſe he could maintain himſelf.

TWO juſtices removed the pauper, *James Ceary*, his wife, and two children from *Storrington* to *Patching* in *Suſſex*; and on an appeal the order of removal was quaſhed, ſubject to the opinion of this Court on the following caſe.

In 1778, the pauper's father, *John Ceary*, then and for ſome years before having been reſident in *Storrington* with his wife and three children, *viz.* the pauper aged about 14, and two younger children, was removed by order of two juſtices with his wife and the ſaid two younger children to *Patching*, from whence he ſhortly after returned to *Storrington* with a certificate from *Patching* regularly executed and allowed, acknowledging him, his wife, *and the two younger children* by name to be inhabitants of *Patching*: but the pauper was neither included in the order of re-

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moval or in the certificate; the pariſh officers of *Storrington* having declared upon the examination of the father before the magiſtrates previous to his removal to *Patching* that as the pauper got his own living, they had nothing to do with him. The pauper at the time of this examination, and for ſome time before, and alſo after the father's return with the certificate to *Storrington* (as above ſtated), until the time of the yearly hiring and ſervice herein after ſtated, ſupported himſelf entirely by his daily labour, and lodged and boarded at his father's houſe in *Storrington*, for which he paid his father 5*s.* *per* week. About two years after the father's return to *Storrington* with the certificate, and while the father continued to reſide under it, the pauper being then about 16 years of age hired himſelf for a year to Mr. *Browne* of *Storrington*, whom he had previouſly ſerved for ſome time as a day-labourer, and ſerved the year out; after which he again worked for himſelf as a day-labourer, and lodged and boarded with his father on the ſame terms as before his ſervice with *Browne*, until he married; and from the time of his marriage he continued to reſide at *Storrington*, but not having done any act to gain a ſettlement, other than as aforeſaid, until the 23d of *January* laſt, when he became actually chargeable, he was removed by the preſent order with his wife and family to *Patching*.

Leach in ſupport of the order of Seſſions, after ſtating the queſtion to be, Whether the pauper were reſident in *Storrington* under the certificate granted to his father, argued in the negative. The certificate not only in terms includes the two younger children, but it is alſo ſtated in the caſe that it was meant by all the parties concerned that the certificate ſhould only include them. If the pauper were not included in the certificate, then his reſidence in *Storrington* was not protected by it under the ſtat. 8 & 9 *W.* 3. *c.* 30 (*a*); and if not, he was not diſqualified by the ſubſequent ſtat. 9 & 10 *W.* 3. *c.* 11. from gaining a ſettlement there by hiring and ſervice. That act was paſſed with reference to, and only extends to the objects of, the former act; and thoſe perſons only, whoſe reſidence is protected in the certificated pariſh by the former one, are diſqualified by the latter from gaining ſettlements in the certificated pariſh by the ordinary modes. A cer-

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(*a*) Which enacts that the pariſh, to which the certificate is granted, ſhall receive and provide for the perſon mentioned in the certificate, *together with his or her family* until they become chargeable, and then it ſhall be lawful for any ſuch perſon *and his or her children*, &c. to be removed, &c.

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tificate is only concluſive on the pariſh granting it as to the facts contained in it. Now the certificate in this caſe is only an acknowlegement by the pariſh of *Patching* that the father, the mother, *and the two younger children*, were inhabitants of that pariſh; it is not therefore concluſive as to the ſettlement of the pauper who was not named in it. It may be admitted that, if the certificate were in general terms that the pauper *and his family* were inhabitants of *Patching*, it would extend to all the children: but here the parties ſeem anxiouſly to have excluded the pauper from the certificate. The ground on which the counſel on the other ſide argued below is this; the certificate protects the reſidence, not only of the party himſelf but of his children alſo, the pauper is one of thoſe children, and therefore he was protected by it: but that mode of reaſoning aſſumes the very queſtion, that the pauper is one of the children whoſe reſidence in *Storrington* was meant to be protected by this certificate.

Garrow and *Partington* contrà. This caſe may be decided by the anſwers to theſe two queſtions; in what character did the pauper's father reſide in *Storrington*; and in what character did the pauper himſelf reſide there? The former lived there under the expreſs words of the certificate, and the latter as part of his family, he not having gained any ſettlement for himſelf. The queſtion has been truly ſtated, namely, whether the pauper did or did not reſide in *Storrington* within the meaning of the 8 & 9 *W.* 3. *c.* 30; for if not, it may be conceded that the ſtat. 9 & 10 *W.* 3. *c.* 11. did not prevent his gaining a ſettlement there by hiring and ſervice. But he was reſiding in *Storrington* under the certificate, and was irremovable from thence, as being a part of his father's family. The former ſtatute recites that many poor perſons chargeable to the pariſh where they live for want of work would in other pariſhes, where employment is to be had, maintain themſelves and families, &c; it then enacts that the certificate ſhall oblige the pariſh, to which the certificate is given, to receive and provide for the perſon mentioned in the certificate *together with his or her family, &c*; and in caſe of their becoming chargeable, it enables that pariſh to remove ſuch perſon *and his or her children* to the place from whence ſuch certificate was brought. Now it has been frequently held in the caſes of emancipation that thoſe who live under the father's roof, and conſtitute a part of his family, are protected by the certificate.

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In *R.* v. *Darlington* (*a*) Ld. *Kenyon* ſaid "The family conſiſts of "thoſe who live under the ſame roof with the pater familias; "thoſe who form (if I may uſe the expreſſion) his fire-ſide." In *R.* v. *Witton cum Twambrookes* (*b*), and *R.* v. *Roach* (*c*), Ld. *Kenyon* enumerated the means by which a child may become emancipated; but none of thoſe exiſt in the preſent caſe. In *R.* v. *Collingbourn Ducis* (*d*), where a ſon of the age of 19 ſerved a year under a yearly hiring in an extraparochial place, it was held that he was not thereby emancipated, though he did not return to his father's houſe. Then there is leſs reaſon to ſay, in this caſe, that the pauper was emancipated; and if not, he continued a part of his father's family. The conſequence of this is that by the very words of the ſtat. 8 & 9 *W.* 3. *c.* 30. he was irremovable from *Storrington;* and then, by the uniform conſtruction put on the ſtat. 9 & 10 *W.* 3. *c.* 11, he was precluded gaining a ſettlement in that pariſh by hiring and ſervice.

Lord Kenyon, Ch. J. In deciding this caſe I wiſh not to diſturb any of the authorities that have been cited, but my opinion in this caſe proceeds on it's own particular circumſtances. Conſider the ſituation of this family; the father, mother, and two of the younger children, who had been reſident at *Storrington*, were removed by an order of juſtices to *Patching:* but to give them an opportunity of returning to *Storrington*, the pariſh officers of *Patching* were applied to for a certificate, which was accordingly given. Now before, and at the time when this certificate was obtained, the pauper had worked as a day labourer, received his wages for his own uſe, had lodged in his father's houſe, and paid a weekly ſum for that accommodation. The form of the certificate too is material; it was granted to the father, the mother, and *the two younger children;* but the pauper was not included either in the order of removal or in the certificate, nor was it the meaning of the parties to include him. If indeed he were under the diſability of gaining a ſettlement by the 9 & 10 *W.* 3., to be ſure this is not one of the modes allowed by that act. But the queſtion is, Whether he is to be conſidered as a certificated perſon? Generally ſpeaking, if a certificate be granted to the head of a family, it extends to all the members of that family: but it is competent to the parties themſelves to narrow the extent of a certificate; and the certificate in queſtion ſeems to have been

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(*a*) *Ante*, 4 vol. 800.

(*b*) *Ante*, 3 vol. 356.

(*c*) *Ante*, 6 vol. 247.

(*d*) *Ante*, 4 vol. 199.

ſpecially framed for the purpoſe of excluding the pauper from the operation it. It is not conceived in general terms, but, after mentioning the father and mother, it goes on to ſpecify the two younger children, omitting the pauper, who was the eldeſt; and it is a known maxim expreſſio unius eſt excluſio alterius. Therefore, on the particular circumſtances of this caſe, I am of opinion that the pauper was not reſident at *Storrington* under the certificate, and conſequently was not diſabled from gaining a ſettlement there by hiring and ſervice: but I deſire to have it diſtinctly underſtood that I do not by this deciſion mean to ſhake the authority of any of the former caſes.

Grose, J. The queſtion is, Whether the pauper's reſidence in *Storrington* were or were not protected by this certificate; for if it were not, he is now ſettled in that pariſh. A certificate only protects three claſſes of perſons; thoſe who are named in it; thoſe who are part of the family of the certificated perſon when it is granted; and his children born in the certificated pariſh after that time. Now the pauper certainly does not come within either the firſt or the third claſs. Nor was he part of his father's family, as far as reſpects the certificate; for the certificate does not mention his name, though it does mention the names of the younger children; and the pariſh officers declared that he was not included in the former order of removal, which was the occaſion of this certificate, becauſe he was capable of gaining a livelihood for himſelf. All the parties intereſted conſidered the pauper to be ſui juris when the certificate was granted, and therefore it was not meant to include him; he was not a part of his father's family for the purpoſes of this certificate.

Lawrence, J. The ſtat. 9 & 10 *W.* 3. *c.* 11. has reſtrained thoſe perſons, who come into any pariſh by virtue of a certificate, from gaining a ſettlement except in one of the two modes there pointed out; and it meant to reſtrain thoſe perſons whom they could not remove. Then the queſtion is, could the pauper have been removed from *Storrington* notwithſtanding the certificate; and would the certificate have been concluſive on the pariſh of *Patching* as to him? It certainly would not have concluded them, becauſe it appears that it was intended to exclude him from the certificate at the time when it was granted. Therefore, if it would not have been concluſive on the pariſh granting the certificate, it ſeems to follow that the pauper gained a ſettlement in *Storrington*, by hiring and ſervice.

Order of Seſſions confirmed.

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Tueſday, Feb. 7th.

Lord WALPOLE *againſt* The Earl of CHOLMONDELEY, in Error.

S. C. in Equity
3. Ves. Jun 402.

Parol evidence may be admitted to explain a latent ambiguity in a will or codicil. But where the deviſor made one will in 1752 and another in 1756 without diſpoſing of his perſonalty or appointing executors by either, and by a codicil (reciting that by his *laſt will* dated in 1752 he had made no diſpoſition of his perſonalty) diſpoſed of it, and appointed executors, it was held that there was no latent ambiguity, ſo as to let in parol evidence to ſhew that the teſtator intended by the codicil to confirm the will of 1756, and not to republiſh that of 1752.

THIS was an iſſue to try whether *George* the late Earl of *Orford* did or did not by his laſt will deviſe to the Earl of *Cholmondeley*, the eldeſt ſon of *George* Lord *Malpas* deceaſed, who was the eldeſt ſon of *George* late Earl of *Cholmondeley*, an eſtate in tail male in remainder expectant immediately on the death of the preſent *Horatio* Earl of *Orford*, and failure of ſons or a ſon of his body, and of iſſue male of the bodies or body of ſuch ſons or ſon, in certain manors, &c. in *Norfolk*. It was tried at the bar of the Court of Common Pleas, when a verdict was given for the plaintiff below, Lord *Cholmondeley*, on which judgment below was accordingly entered up for the plaintiff. But that Court having on the trial rejected certain evidence offered for the defendant, a bill of exceptions was tendered, and ſealed by the Lord Chief Juſtice; and on that bill of exceptions, which was afterwards annexed (*a*) to the record, the caſe appeared to be as follows.

The counſel for the plaintiff, in order to prove and maintain the iſſue on his part, proved and gave in evidence that the late Earl of *Orford*, being ſeiſed in fee of the manors in queſtion, by will dated the 25th of *November* 1752, duly executed, &c. deviſed the ſaid premiſes to *J. Harris* and *H. Cruwys* and their heirs, to the uſe of his firſt and other ſons in tail male; remainder to his uncle *Edward Walpole* for life; remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male; remainder in like manner to his uncle *Horatio Walpole* and his firſt and other ſons in tail male; remainder in like manner to Lord *Malpas*, eldeſt ſon of *George* Earl of *Cholmondeley* [and father of the preſent Earl *Cholmondeley*] and his firſt and other ſons in tail male; remainder in like manner to *Robert Cholmondeley* and his firſt and other ſons in tail male; remainder to Lady *Maria Churchill* and her firſt and other ſons in tail male; remainder to his great uncle *Horatio Walpole* for life; remainder to the uſe of the defendant *Horatio* Lord *Walpole*, and his firſt and other ſons in tail male; with divers remainders over; reverſion in fee to his own right heirs. They alſo gave in evidence a certain writing, purporting to be a

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(*a*) Vid. Stat. 13 *Edw.* 1. *c.* 31.

codicil

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codicil to the laſt will of the ſaid late Earl of *Orford*, dated 4th *December* 1776; in which, after reciting *that by his laſt will and teſtament in writing dated the 25th of November 1752 he had deviſed all his real eſtates to certain uſes*, but had not charged the ſame with the payment of his debts or legacies, or diſpoſed of his perſonal eſtate, or appointed any executors, he declared that writing to be a codicil to his ſaid laſt will, and to be accepted and taken as part thereof, and revoked the ſaid will ſo far only as the ſame was incompatible with the codicil; and he ſubjected all his eſtates, &c. to the payment of his debts and legacies, gave ſeveral legacies, and appointed executors, &c. The plaintiff's counſel further produced as a witneſs on the part of the plaintiff one *D. Potter*, who depoſed that the ſaid *G.* late Earl of *Orford*, after the making and publiſhing of his aforeſaid will, to wit, ſome time in the month of *December* 1776 or *January* 1777 duly ſigned ſealed publiſhed and declared the ſaid codicil, as a codicil to his laſt will and teſtament, in the preſence of him (*Potter*) one *E. Miles* and *R. Dyſon*, being three credible witneſſes, who at the ſame time duly atteſted &c. That whilſt the ſaid Earl of *Orford* was ſigning the ſaid codicil, he (*Potter*) obſerved that ſeveral parts thereof were of the proper hand-writing of the ſaid Earl of *Orford*; and upon the codicil being produced upon the trial he (*Potter*) inſpected the ſame, and proved as aforeſaid that the ſaid parts thereof were of the proper hand-writing of the ſaid Earl of *Orford*. The plaintiff's counſel further gave in evidence that the ſaid late Earl of *Orford* on the 5th of *December* 1791 died ſo ſeiſed of the ſaid manors, lands, &c. without leaving any ſon of his body lawfully begotten; that the ſaid *E. Walpole*, brother of the late deceaſed father of the late Earl of *Orford*, died in the lifetime of the ſaid teſtator *George* late Earl of *Orford*, without leaving any ſon of his body lawfully begotten; and that by virtue of the ſaid premiſes the ſaid *Horatio Walpole*, youngeſt brother of the late deceaſed father of the ſaid late Earl of *Orford*, became and was and ſtill is ſeiſed of the ſaid premiſes, with the appurtenances, in his demeſne as of freehold for the term of his life; and as uncle and heir of the ſaid late Earl of *Orford* became and now is Earl of *Orford*; and that the late Lord *Malpas* (eldeſt ſon of the late Earl of *Cholmondeley*, in the will mentioned) alſo died in the lifetime of the teſtator, and in the lifetime of his late father, the late Earl of *Cholmondeley* deceaſed; and that the

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plaintiff *G. J.* Earl of *Cholmondeley* is the only ſon of the body of the ſaid Lord *Malpas* deceaſed. That at the ſaid trial the ſaid *D. Potter* being croſs-examined by the defendant's counſel, further depoſed that at the time of the ſigning, &c. the ſaid codicil, no writing whatever was in any manner annexed or affixed to the codicil, or ſhewn or produced by the ſaid late Earl of *Orford* to him *(Potter)*, *E. Miles*, or *R. Dyſon*, or any of them; and that the ſaid late Earl of *Orford* publiſhed and declared to him *(Potter)*, *E. Miles*, and *R. Dyſon*, the ſaid laſt-mentioned writing as and for and to be a codicil to his laſt will and teſtament, but did not mention to them or any of them the date, or give any further deſcription of the laſt will and teſtament to which he intended that it ſhould be a codicil.

And the counſel for the defendant, in order to maintain and prove the iſſue on his part, gave in evidence a certain other writing, purporting to be the laſt will and teſtament of the ſaid *G.* late Earl of *Orford*, dated the 31ſt *March* 1756, whereby he deviſed all his manors, lands, &c. to *J. Harris* and *H. Cruwys*, to the uſes, upon the truſts, &c. therein mentioned, namely, in default of iſſue male of his own body to his uncles *E.* and *Horatio Walpole* reſpectively, preciſely in the ſame manner as in the will of 1752; then upon failure of iſſue male of his uncles *Edward* and *Horatio Walpole* reſpectively, inſtead of limiting the premiſes to Lord *Malpas*, as in the will of 1752, the deviſor by this will limited the premiſes to his great uncle *Horatio Walpole* for life, remainder to the preſent Lord *Walpole* for life, remainder to his firſt and other ſons in tail male; remainder to *Thomas Walpole*, *Richard Walpole*, and *Robert Walpole*, and their reſpective firſt and other ſons in tail male; remainder to Lord *Malpas* and his firſt and other ſons in tail male, with divers remainders over; reverſion to the ſaid Earl in fee; which ſaid laſt-mentioned will was duly executed, &c. And the defendant's counſel inſiſted that the ſaid codicil to the laſt will and teſtament of the ſaid late Earl of *Orford* or the matters therein contained ratified and confirmed and was intended by Lord *Orford* to ratify and confirm the ſaid will of 1756, and did not revoke cancel or make void nor was intended by Lord *Orford* to revoke cancel and make void that writing, or to republiſh and make valid in law, as his laſt will, the will of 1752. And in order to ſhew to the Jury that at the time of making ſaid codicil the ſaid late Earl of *Orford* had not by that codicil revoked cancelled or made void, and

and did not intend to revoke cancel or make void the will of 1756, and republiſh the will of 1752, the defendant's counſel then proved that the ſaid will of 1756 was duly ſigned ſealed publiſhed, &c. And they then offered to prove and give in evidence that *Horatio Walpole* the great uncle at the time when the ſaid late Earl executed and publiſhed the ſaid will of 1756 and in his preſence publiſhed a codicil, whereby he deviſed his the ſaid *Horatio Walpole*'s eſtate, on failure of ſons of his ſon *Horatio Walpole*, to the Earl of *Orford* for life, and ſo in ſtrict ſettlement to his ſons; remainder to truſtees to ſupport contingent remainders; remainder to his firſt and other ſons in tail male; remainder to the ſaid Earl of *Orford* for life without waſte: remainder to the ſaid truſtees to ſupport contingent remainders; remainder to the firſt and other ſons of the ſaid Earl in tail male; remainder to *Edward Walpole* uncle of the ſaid Earl in like manner; remainder to *Horatio Walpole* uncle of the ſaid Earl in like manner; with divers remainders over; reverſion to the ſaid *Horatio Walpole* the deviſor in fee. And the defendant's counſel then and there further offered to give in evidence that at the time of the ſigning ſealing publiſhing and declaring the ſaid laſt-mentioned writing by the ſaid *George* late Earl of *Orford*, and of the ſaid laſt-mentioned codicil by the ſaid *Horatio Walpole* his great uncle, the ſaid late Earl of *Orford* declared to the ſaid *Richard Capper* (one of the witneſſes to the codicil) that his ſaid great uncle and he the ſaid late Earl of *Orford* had by theſe inſtruments made reciprocal limitations in favour of each other's families in caſe of failure of iſſue of either of them. The defendant's counſel further offered to give in evidence that after the making of the laſt-mentioned codicil, he the ſaid *Horatio Walpole*, great uncle to the ſaid *George* late Earl of *Orford*, was created a Peer of *Great Britain* by the title of Lord *Walpole*, and in 1757 died ſo ſeiſed of the ſaid manors meſſuages lands, &c. in the laſt-mentioned codicil deviſed, without having in any manner cancelled annulled or revoked the ſaid laſt-mentioned codicil; and that at his death the defendant, as his eldeſt ſon and heir, became Lord *Walpole*, &c. They further offered to give in evidence that in the year 1776 one *Carlos Coney*, being then the attorney and ſolicitor of the ſaid late Earl of *Orford*, was with the Earl at one of his dwelling-houſes when the Earl of *Orford* deſired him to make a codicil to his will, and gave him ſome verbal inſtructions relating to ſuch codicil, with directions to leave blanks therein for the names of the executors, truſtees, and

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legatees; that he told the Earl he muſt have his will, which the ſaid Earl told *Coney* was in the hands of a Mr. *Moone;* whereupon *Coney* deſired the ſaid Earl to give him a letter to Mr. *Moone*, who otherwiſe might refuſe to deliver his will to him; that the ſaid Earl gave *Coney* a letter to *Moone*, who delivered the will of 1752 to *Coney;* that *Coney* then prepared the codicil of the 4th of *December* 1776 according to the inſtructions, &c. in which blanks were left for the names of the executors truſtees and legatees agreeably to his Lordſhip's directions, he (*Coney*) not knowing at that time that the ſaid Earl had ever made any other will, but believing, when he prepared the codicil, that the ſaid writing which he had received from *Moone* was in fact the then exiſting laſt will and teſtament of the ſaid Earl of *Orford*, and that therefore, according to the uſual mode of recitals, he inſerted the date of that writing as the date of his laſt will and teſtament in the codicil; that he never read over or in any manner explained to the ſaid Earl the ſaid laſt-mentioned writing; that the ſaid Earl did not then or at any time inform *Coney* that he intended or meant by ſuch codicil to revoke any diſpoſition he had made by his will of his real eſtate or any part thereof, or to change any of the limitations made thereof, or to alter the line of ſucceſſion in which the real eſtate would go as his will then ſtood, nor did the ſaid Earl give him (*Coney*) any inſtructions whatever to make by the codicil any change or alteration in the limitations of the real eſtates further or otherwiſe than to make them ſubject to the payment of his (the Earl's) debts legacies and funeral expences, as ſet forth in the ſaid codicil. That the will of 1752 remained in the poſſeſſion of him (*Coney*) while he was preparing the draft of the codicil, and was returned to the Earl when the draft of the codicil was delivered to him (the Earl) a ſhort time before the codicil bears date; that the ſaid Earl declined to ſign the codicil when he (*Coney*) brought it to him; that the ſeveral blanks filled up in the codicil of 4th *December* 1776 with the names of the executors truſtees and legatees are all of the proper hand-writing of the ſaid Earl of *Orford;* and that he (*Coney*) never heard the ſaid Earl mention the plaintiff in this cauſe or any of his family, nor had he ſeen the plaintiff in company with the ſaid Earl, but had ſeveral times ſeen the ſon of the defendant in his company. The counſel for the defendant further produced and offered to the Court the teſtimony of the ſaid *Moone* to prove that he (*Moone*) for 40 years previous

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previous to and until the death of the ſaid late Earl of *Orford* was employed by him as his ſteward and agent, and that the will of 1752 was delivered to him *(Moone)* in *November* 1752 by *A. Cruwys* now deceaſed but then the attorney or ſolicitor of the ſaid late Earl to keep, and it was continually in his cuſtody from that time until he delivered it to *Coney* by virtue of the letter before mentioned; that whilſt the will of 1752 was in his *(Moone*'s*)* cuſtody, and not long before he delivered the ſame to *Coney*, he *(Moone)* was in company with the ſaid late Earl of *Orford*, and Mrs. *Sturk*, in the codicil mentioned; when ſhe ſaid to *Moone* "you have got my Lord's will;" to which *Moone* replied "it is very ſafe;" that the ſaid Earl then ſaid "*Moone* will take care of it."

But notwithſtanding this the plaintiff's counſel objected, and inſiſted that ſince the late Earl of *Orford* had by his codicil republiſhed and made valid in law the will of 1752 as his laſt will and teſtament, and thereby revoked the ſaid will of 1756, the ſaid matters on the part and behalf of the defendant ſo offered to be given in evidence ought not to be given or admitted; nevertheleſs the defendant's counſel inſiſted before the ſaid Court that they ought to be admitted to give in evidence the ſaid matters, &c. in oppoſition and contradiction to the evidence given for and on the behalf of the plaintiff, which the ſaid juſtices denied to permit or admit, and declared their opinion that the ſaid matters ſo offered to be given in evidence on the part of the defendant ought not to be given or admitted; and thereupon the jury aforeſaid gave their verdict for the plaintiff againſt the defendant; Whereupon the defendant's counſel propoſed their exception to the opinion of the ſaid juſtices, &c.

Williams Serjt. for the plaintiff in error. It appears on the record that the late Lord *Orford* made two wills, one in 1752, the other in 1756, and that by the laſt he revoked the former in the particular deviſe in queſtion. It alſo appears that the deviſor had made no proviſion by either of thoſe wills for the payment of debts or legacies, nor diſpoſed of his perſonalty, nor appointed executors; and that it was in order to ſupply thoſe omiſſions that he made the codicil in 1776. By that codicil the deviſor did not expreſsly revoke the will of 1756, which he would have done in expreſs terms if ſuch had been his intention; and yet it refers to the will dated in 1752, and ſets up the laſt will, which applies to that of 1756. The queſtion therefore is, Whether under

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the circumſtances it be not doubtful to which of the wills the codicil refers, and if it be, whether the evidence offered below ought not to have been received to remove that doubt. Now it is an acknowledged rule of law that where there is a latent ambiguity in a will, parol evidence may be given to explain it. Ambiguitas verborum latens verificatione ſuppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. *Bac. Max.* 23. Lord *Cheney*'s caſe, 5 *Rep.* 68. *b*; *Lepiot* v. *Brown*, *Salk.* 7; *Harris* v. *Biſhop of Lincoln*, 2 *P. Wms.* 35; *Fonnereau* v. *Poyntz*, 1 *Bro. Ch. Caſ.* 472; *Thomas* d. *Evans* v. *Thomas*, *ante* 6 vol. 671 (*a*); and *Thomas* v. *Steward*, at *Hereford* Lent aſſizes 1784 (*b*) cor. *Buller* J. On the authority of theſe caſes it is contended that the evidence offered by the plaintiff in error ought to have been received to explain the latent ambiguity in the codicil, it being doubtful to which of the wills it refers; that doubt ariſing from the circumſtance of the codicil being applicable to both the wills as far as reſpects the charge of debts on the eſtate, diſpoſing of the perſonalty, and appointment of executors, and from the ambiguous reference to both the wills, to the one by it's date, and to the other by it's name. It recites the date of the former will, and it refers to his *laſt will*, which primâ facie muſt be underſtood to mean his laſt ſubſiſting will, namely, that of 1756. This recital is as ambiguous as if it had been a recital of his laſt will dated *March* 31ſt 1752; that would have been a reference to the *year* in which the former will was made, and to the *day of the month* of the latter; and that ambiguity muſt have been explained by parol

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(*a*) See alſo *Bradwin* v. *Harpur*, *Ambl.* 374.

(*b*) That caſe was ſtated to be as follows; *M. Pardoe* widow being ſeiſed of the premiſes in queſtion in fee by her will bearing date ſome time in *January* 1777 deviſed them to *Thomas Thomas* eldeſt ſon of *Thomas Thomas* of *Chatham* in the county of *Kent* ſhip carpenter, for life, remainder to truſtees to ſupport contingent remainders, remainder to his firſt and other ſons in tail male, remainder to defendant *Charles Stuart* for life, remainder to truſtees &c, remainder to his firſt and other ſons in tail male, with divers remainders over; and died ſo ſeiſed. *Thomas* the father had had a ſon of the name of *Thomas Thomas*, who was his eldeſt ſon, but he was dead without iſſue many years before the making of the will. *Richard Thomas*, the leſſor of the plaintiff, was the eldeſt ſon of *Thomas* at the time of making the will. The defendant contended that the deviſe to *Thomas Thomas* was void, he being dead at the time of making the will, and conſequently that the defendant was entitled to take as next in remainder: but parol evidence was admitted of a Mrs. *Vetler*, who was daughter of old *Thomas* and ſiſter of the leſſor of plaintiff, that ſome time before the making of the will ſhe was on a viſit for ſome months at the teſtatrix's houſe, during which time ſhe often informed the teſtatrix that her eldeſt brother *Thomas Thomas* was dead, and that the leſſor of the plaintiff *Richard Thomas* was then her eldeſt brother. There was alſo further evidence of the teſtatrix having enquired of another perſon reſpecting the family of old *Thomas*, who had alſo informed her that *Richard Thomas* was the eldeſt ſon. This evidence being given, the jury found a verdict for the plaintiff.

evidence.

evidence. Though the expreſſion "laſt will" is generally uſed in a technical ſenſe, it is ſometimes uſed in the ſtrict and literal ſenſe; and parol evidence ſhould be admitted to ſhew in what ſenſe it was uſed by this deviſor. In the inſtance of cancelling wills the courts have received parol evidence to ſhew quo animo the will was deſtroyed; whether by miſtake or not. *Onions* v. *Tyrer*, 1 *P. Wms.* 343; *Burtonſhaw* v. *Gilbert*, *Cowp.* 52; and yet thoſe inſtances are ſtronger than the preſent, becauſe the ſtatute of Frauds expreſsly enacts that no deviſe of lands ſhall be revocable otherwiſe than by ſome other will or codicil in writing &c. or by burning cancelling or tearing the ſame &c. It is true that *cancelling* has been called an equivocal act in itſelf: but that is not correct; it only becomes equivocal by the circumſtances reſpecting it that are introduced by the parol evidence. It has alſo been held that declarations of the deviſor, reſpecting inſtructions given to the maker of the will, are admiſſible in evidence: Lord *Cheney*'s caſe, 5 *Rep.* 68; and *Thomas* d. *Evans* v. *Thomas*. Then at all events the evidence of *Coney*, to whom Lord *Orford* gave inſtructions to draw his codicil, ought to have been received. By the introduction of that evidence it would have appeared that the deviſor was deſirous of making a codicil "to his will," which is at leaſt as applicable to the will of 1756 as to that of 1752. That evidence would alſo have ſhewn that the recital in the codicil of the will dated 1752 was a miſtake. This would have let in all the other evidence offered, particularly that relating to the converſation between the deviſor and his great uncle *H. Walpole* reſpecting the limitations of each other's eſtates, which was extremely material to ſhew that the deviſor at the time he made the codicil did not intend to revoke, but to confirm, the will of 1756. It is unneceſſary to conſider what weight this body of evidence would have had with the jury; it is ſufficient to entitle the plaintiff in error to reverſe this judgment that it ought to have been received.

Palmer Serjt. contrà. The whole argument of the plaintiff in error is founded on an aſſumption that there is a latent ambiguity in the codicil, that it is doubtful to which of the wills it refers, and that therefore the parol evidence, which was offered, ought to have been admitted to explain it. But the foundation itſelf fails, and with it all the authorities that were cited to ſupport it. One great ground of argument is that the deviſor had made no proviſion in either of his wills for the payment of his debts, or

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diſpoſed of his perſonal eſtate, that the codicil was made expreſsly for the purpoſe of ſupplying thoſe omiſſions, and that the codicil is referable to the latter as well as to the former will, except as to the date: but the concluſion to be drawn from thence applies with greater force in ſupport of the caſe of the defendant in error than of that of the plaintiff; for where two things agree in every particular but one, and a perſon refers in expreſs terms to the one with that particular variation, it is deciſive to ſhew that ſuch perſon meant to refer to that one. Another circumſtance from which the ambiguity is ſaid to ariſe is the recital in the codicil of the deviſor's *laſt will* and teſtament, which, it is ſuppoſed, raiſes a preſumption that the deviſor did not intend to refer to and ſet up the will of 1752, which was not his laſt will: but the fallacy of that reaſoning conſiſts in conſidering a *laſt will* to be the will which is made laſt in point of time; whereas no will can (ſtrictly ſpeaking) be a laſt will until the deviſor's death; and the general meaning of the term "laſt will" is that which is to be the operative inſtrument at the death of the party. *Swinburne* (*a*) ſays, generally ſpeaking, a teſtament and laſt will are uſed indifferently, though in ſtrictneſs they differ; "a laſt will is a "general word, and agreeth to every ſeveral kind of laſt will "or teſtament: but a teſtament, properly underſtood, is one kind "of laſt will, that wherein an executor is named." And the common lawyers have borrowed almoſt all their terms reſpecting wills and teſtaments from the civilians. In 1 *Inſt.* 111. *wills* and *laſt wills* are uſed as ſynonymous terms. Suppoſe the deviſor had referred to "my will" without adding "laſt" to it, and referred to the date in 1752, there would have been no ambiguity; and the addition of the word "laſt" does not create any, becauſe "will" and "laſt will" are ſynonymous. All the caſes cited for the plaintiff in error eſtabliſh the doctrine contended for by the defendant, becauſe they ſhew that where parol evidence is admitted to explain a latent ambiguity, it is in caſes which are conſidered as exceptions to the general rule; and this is not one of thoſe exceptions. In *Ulrich* v. *Litchfield* (*b*) Lord *Hardwicke*, commenting on this doctrine, ſaid "upon the conſtruction of a "will courts of law and equity do not admit parol evidence, ex- "cept in two caſes; 1ſt. To aſcertain the perſon where there are "two of the ſame name, or elſe where there has been a miſtake "in a chriſtian or ſurname, and this upon an abſolute neceſſity,

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(*a*) *Swinb.* 2.

(*b*) 2 *Atk.* 372.

"as in Lord *Cheney*'s caſe, 5 *Co.* 68., where there were two ſons "of the name of *John*; the ſecond caſe is with regard to reſulting "truſts relating to perſonal eſtates, where a man makes a will and "appoints an executor with a ſmall legacy, and the next of kin "claim the reſidue, in order to rebut the reſulting truſt for the "next of kin. In the caſe of *Littlebury* v. *Buckley*, *Eq. Caſ. Abr.* "245, and The Counteſs v. The Earl of *Gainſborough*, 230. parol "evidence was admitted to aſcertain the perſon who was to have "the reſidue." The caſe of *Jones* v. *Newman* (*a*) fell within the firſt of thoſe exceptions, and therefore parol evidence was admitted to explain which of the two perſons of the name of *John Cluer*, father and ſon, was intended. Nor do the caſes of *Onions* v. *Tyrer*, and *Burtonſhaw* v. *Gilbert*, which were cited to ſhew that parol evidence may be admitted to explain quo animo a will was cancelled, whether by miſtake or with an intent to cancel it, aſſiſt the plaintiff in error in this caſe; for *cancelling* is neceſſarily an equivocal act on account of the mode in which it muſt be done, and therefore parol evidence muſt, from neceſſity, be admitted to ſhew quo animo it was done. With regard to the evidence of an attorney, who is inſtructed to prepare a will or codicil, as to what paſſed at the time, it may or may not be admiſſible according to the nature of the iſſue to be tried: if a legacy be given to *J. S.* of *X.* and there be two perſons of that name, the attorney may give evidence of a declaration of the teſtator, made at the time, that he meant one of them in particular; or if the due execution of the will be brought in queſtion, the evidence of the attorney may be admitted. But here it is admitted that the codicil was properly executed; and there is no diſpute about the identity of the perſons named in the will or codicil. If the evidence of *Coney* had indeed been received, it would probably have had the effect of confirming, inſtead of contradicting, the caſe made by the defendant in error: but the objection now made is not to the effect, but to the admiſſibility, of his evidence; and if his evidence be rejected, there is ſtill leſs reaſon for receiving the other evidence which was offered.

Lord **Kenyon**, Ch. J. This caſe has been argued with great ability; and if the arguments urged on behalf of the plaintiff in error have not convinced us that the deciſion in the Court of Common Pleas was wrong, we cannot expect that another argument will have that effect.

(*a*) 1 *Bl. Rep.* 60.

1797.
Lord Walpole *againſt* Lord Cholmondeley, in Error.

There is no doubt but that parol evidence may be received in many caſes to explain doubts in wills; and the rule is correctly deſcribed in the maxim of Ld. *Bacon*, which has been alluded to. Where extrinſic circumſtances let in by parol teſtimony, explaining the ſituation of the teſtator's family and of the legatee's, introduce a doubt of the teſtator's intention, the ſame kind of evidence that introduced the doubt may be admitted to explain it. On that proceeded the caſe that I mentioned on a late occaſion (*a*) of *Beaumont* v. *Fell* (*b*), where a legacy was given by the will to *Catherine Earnley*, there being no ſuch perſon in exiſtence: there was no ambiguity on the face of the will, but the latent ambiguity was introduced by extrinſic evidence, and the ſame kind of evidence alſo ſhewed that there was a perſon of the name of *Gertrude* whom the teſtator called *Gatty*, which name the perſon who drew the will miſtook for *Katy;* in that caſe therefore as parol evidence was admitted to ſhew the latent ambiguity, parol evidence was alſo admitted to explain it. It has been argued that the evidence which was rejected by the Court of Common Pleas ought to be received in many caſes that might be put: I will not ſay that it ought not; but this, I think, we may ſafely lay down as a rule, that in order to make ſuch evidence admiſſible the party propoſing it muſt put his caſe into a ſituation to enable the Court to receive it; he muſt ſhew a latent ambiguity, without which the Court cannot receive it. All the caſes that have been cited profeſs to proceed on that ground: and if the rule be eſtabliſhed, it is not impaired becauſe a Judge at Niſi Prius, meaning to be guided by it, miſtakes the application of the rule to the particular caſe before him. Without minutely examining all the caſes, or ſaying whether I do or do not agree with them, it is ſufficient for me to abide by the principle eſtabliſhed by them; the principle is the thing which we are to extract from caſes, and to apply it in the deciſion of other caſes.

Then let us conſider this caſe, and ſee whether there was any latent ambiguity. In the year 1752 Lord *Orford* made one will, and afterwards in 1756 he made another; what became of the will of 1756, or whether there were more copies of it than one, does not appear; in 1776 he gave directions for a codicil, and directed *Coney* to apply to *Moone*, in whoſe hands the will of 1752 was lodged,

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(*a*) *Thomas* d. *Evans* v. *Thomas*, *ante*, 6 vol. 676.

(*b*) 2 *P. Wms.* 141.

for

for that will to enable him to make the codicil. Now neither of thoſe inſtruments was a will, properly ſo called, until the death of the deviſor; both were ambulatory until that time, and either of them was capable of being deſtroyed or ſet up by the deviſor. Suppoſing Lord *Orford* had ſaid to *Coney* "I have two wills in "*Moone*'s hands, deſire him to ſend me the laſt will," and *Moone* had by miſtake ſent him the firſt, and that miſtake had been ſhewn by parol evidence; there would have been a latent ambiguity, and it ſeems to me (though the opinion is extrajudicial) that that ambiguity might have been explained by other parol evidence; on the ſame principle, as in the inſtance of cancelling a will, where parol evidence is admitted to ſhew quo animo the act was done; or as in the caſe of a child deſtroying a deed (*a*). After the codicil was drawn by *Coney*, it is ſaid that it was left by him with Lord *Orford*, together with the will of 1752, who after ſome time filled up the blanks with his own hand, and executed the codicil, thereby profeſſing to ſet up the will of 1752: but that does not introduce any latent ambiguity; we ought not to let in parol evidence, which, if admitted, inſtead of explaining any ambiguity would only introduce a looſe conjecture. But I diſclaim forming my opinion on the effect of the evidence offered; I go upon this ground that there was no latent ambiguity introduced by parol evidence to let in the parol evidence which was tendered for the plaintiff in error. This is a ſatisfactory ground; and it is almoſt too clear to be diſcuſſed.

GROSE, J. When we conſider what the law was before the ſtatute of Frauds, and what alterations were made by that act, we cannot determine that the evidence offered ought to have been received. In 2 *Bac. Abr.* 309, it is ſaid, "It ſeems to have "been agreed as a general rule, even before the ſtatute of Frauds "and Perjuries, that no parol evidence could be admitted to con"trol what appeared on the face of a deed or will, not only "from the danger of perjury, but from a preſumption that what"ever the parties had at that time in contemplation was all "reduced into writing:" for that poſition he cites Lord *Cheney*'s caſe, 5 *Co.* 68. and *Altham*'s caſe, 8 *Co.* 155. *a.* The former of thoſe caſes lays down the rule and the exception to it. The rule is, "The party ſhall not be received to any averment out of

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(*a*) Vid. *Palm.* 402.

Lord WALPOLE *againſt* Lord CHOLMONDELEY, in Error.

"the will; for the will concerning lands ought to be in writing, "and the conſtructions of wills ought to be collected from the "words of the will in writing, and not by any averment out of "it; for it would be full of great inconvenience that none ſhould "know by the written words of a will what conſtruction to "make or advice to give, but it ſhould be controlled by collateral "averments out of the will." Then follows the exception to this rule; "But if a man has two ſons both baptized by the "name of *John*, and conceiving that the elder (who had been "long abſent) is dead deviſes his land by his will in writing to "his ſon *John* generally, and in truth the elder is living; in "this caſe, the younger ſon may in pleading or in evidence allege "the deviſe to him; and if it be denied, he may produce wit"neſſes to prove his father's intent, that he thought the other "to be dead, or that he at the time of the will made named his "ſon *John* the younger, and that the writer left out the addition of "the younger." That was the caſe of a latent ambiguity. Then it comes to the queſtion, Whether there is any latent ambiguity in this caſe; for I agree with Lord *Kenyon* that in order to let in parol evidence to contradict a will the party muſt lay a foundation by ſhewing that there is a latent ambiguity: but I think there is no latent ambiguity here. With regard to the obſervation made on the term "laſt will;" the anſwer given was the true one; it is a general term, ſignifying only "a will." It is not pretended that *Moone* had two wills belonging to the deviſor; if he had, perhaps a doubt might have been raiſed whether he followed the directions of the deviſor in delivering the will of 1752 to *Coney*. Then it was contended that at all events *Coney*'s evidence ought to have been received: but the anſwer is, that before any parol evidence is admitted to explain a will, a latent ambiguity muſt be ſhewn; and none having been ſhewn in this caſe, the evidence offered was properly rejected. The conſequences of receiving this evidence would be prejudicial to the law reſpecting property; it would bring into doubt that which has been conſidered as the law of the land, and it would make the ſtatute of Frauds mere waſte paper.

LAWRENCE, J. After what has been ſaid by the reſt of the Court very little remains for me; I ſhall therefore content myſelf with ſaying that I agree with the judgment of the Court on this ground, that in order to let in parol evidence, the Court muſt feel that if the evidence propoſed be admitted it will raiſe an

ambiguity,

ambiguity, or that it is ſuch evidence as would have enabled the Jury to ſay that the codicil was intended to be applied to the ſecond and not to the firſt will; for if not, it is the duty of the Court to reject the evidence as irrelevant. Now it ſeems to me that it only raiſes a conjecture; and whatever conjecture I may have, I cannot ſay that the Jury would have been warranted in drawing that concluſion from the evidence. Before ſuch a concluſion can be drawn, it muſt be ſuppoſed that Lord *Orford*, when he ſent to *Moone* for the will of 1752, had forgotten what he had done in 1756. I rather draw this concluſion from the evidence, that when Lord *Orford* referred to *Moone* he knew where both the wills were depoſited, and that by referring to *Moone* who had the cuſtody of the will of 1752 he meant to confirm that will. As to the expreſſion "laſt will," it means only the laſt diſpoſition that a teſtator intends to make of his property; and when Lord *Orford* referred to his laſt will, dated in 1752, it was the ſame as ſaying "the will which I made in 1752 is the laſt act that I intend to do "in my lifetime." The converſation that paſſed between *Moone* and Mrs. *Sturk* in Lord *Orford*'s preſence, and the filling up the blanks in the codicil by Lord *Orford* after it was left with him by *Coney*, alſo ſhew that the deviſor conſidered the inſtrument dated in 1752 as that which he deſigned for his operative will. It ſeems to me therefore that, if the evidence propoſed had been admitted, there would have been no ground for the Jury to preſume that the deviſor intended to apply the codicil to the will of 1756; and conſequently the evidence offered was properly rejected. With regard to that part of the evidence reſpecting the declaration of the deviſor's uncle, from which it is inſinuated that the deviſor, after he had the benefit of his uncle's codicil which was executed at the ſame time with the will of 1756, could not intend to act ſo diſhonourably as to revoke the will of 1756 and to ſet up a prior will inconſiſtent with that of 1756; it is mere conjecture, and not admiſſible in evidence becauſe the character of the deviſor was not in iſſue. I remember a caſe (*a*) ſome years ago at *Wincheſter* before Mr. Juſtice *Buller*, where on a queſtion reſpecting the validity of a will that Judge refuſed to receive evidence of the character of the deviſee, becauſe it was not then in iſſue. On the whole therefore I am of opinion that, if the evidence offered had been

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(*a*) *Doe* d. *Farr* v. *Hicks*, *Winton* Sum. Aſſ. 1789.

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been left to the Jury, they would not have been warranted in ſaying that the deviſor made a miſtake in ſetting up the will of 1752 by his codicil, and conſequently that the Court of Common Pleas did right in rejecting it.

Judgment confirmed.

Wedneſday, Feb. 8th.

The KING *againſt* W. LOVET.

It is no objection to an information on the game laws that it is not qui tam.

On an information, charging the defendant with keeping and uſing a dog and alſo a gun on the ſame day, he can only be convicted in one penalty.

If the evidence be given on the ſame day that the defendant appeared and pleaded, it will be intended that the evidence was given in his preſence.

A magiſtrate ſhould ſtate all the evidence in the conviction, and not merely the reſult of it.

THIS was a conviction before a juſtice of the peace on the game laws. The information of *J. Allgood* ſtated that the defendant on the 5th of *September* 1796 at, &c. "did keep and uſe a "certain dog called a ſetting dog, *and alſo* a certain engine called a "gun to kill and deſtroy the game, againſt the form of the ſtatute, "&c;" without praying that he might have a moiety of the forfeiture, or ſaying for whom he ſued. It further appeared on the conviction that on the 16th of *September* the defendant aped in perſon and pleaded not-guilty; and that on the ſaid 16th of *September* a credible witneſs, &c. ſwore that the defendant on the 5th of *September* at, &c. "did keep and uſe a cer-"tain dog called a ſetting dog and alſo a certain engine called a "gun to kill and deſtroy the game;" whereupon the defendant was convicted; and he was adjudged "for *his offence aforeſaid* "to have forfeited 5*l.* to be diſtributed as the ſtatute directs."

Law and *Holroyd* took three objections to the conviction. 1ſt, The information is not qui tam; it is only for the informer, and not for the pariſh. 2dly, The information charges the defendant with two offences, "keeping and uſing a dog, and "alſo keeping and uſing a gun," and he is only convicted of one "for his offence aforeſaid." Therefore it is uncertain of which he is convicted, and he could not plead this conviction in bar to any action or proſecution commenced againſt him for either. This is not like a charge of keeping and uſing a gun on the ſame day, which is only one offence; it is for keeping and uſing a dog, *and alſo* for keeping and uſing a gun: now the bare *keeping of a dog* for the deſtruction of game is a ſeparate offence, and *uſing a gun* is another, and for any thing that appears on this conviction they may have been diſtinct offences in

The King *againſt* Lovet.

in this inſtance. 3dly, It does not appear that the evidence was given in the preſence of the defendant. *R.* v. *Vipont*, 2 *Burr.* 1165. and *R.* v. *Crowther*, *ante*, 1 vol. 125. It does not follow that, becauſe the evidence was given on the ſame day when the defendant pleaded, he was preſent when it was given.

Lord Kenyon, Ch. J. (ſtopping *Wood* who was to have argued in ſupport of the conviction) ſaid that none of the objections are well founded. As to the firſt; the precedents agree with this information (*a*). With regard to the ſecond; the defendant is only charged with one offence, and therefore could only be convicted of one. If a perſon go in purſuit of game with a dog and gun on the ſame day, he can only be convicted in one penalty. On the third objection perhaps I ſhould have had great doubts, if this were res integra. But as it was ſo lately decided in this Court, in *R.* v. *Thompſon* (*b*), that where the evidence is given on the ſame day when the defendant appeared, it will be intended that the evidence was given in his preſence, and as that precedent may have guided the magiſtrates on ſimilar occaſions ſince, I am inclined to ſupport this conviction.

Per Curiam, Conviction affirmed (*c*).

The King *againſt* Payton.

Wedneſday, Feb. 8th.

A writ de excommunicato capiendo ſtated that the defendant was excommunicated in a cauſe of "defamation and ſlander merely ſpiritual;" and held ſufficient.

If the ſentence of the greater, inſtead of the leſſer, excommunication be pronounced, it is only a ground of appeal: but this Court will not quaſh a writ de excommunicato capiendo for that objection.

It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation.

THIS caſe, having been argued in laſt *Michaelmas* term by *Manley* in ſupport of the rule and *Warren* contrà, ſtood over for the opinion of the Court, which was now delivered, as follows, by

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(*a*) Vid. 2 *Hawk. c.* 26. *ſ.* 20.

(*b*) *Ante*, 2 vol. 18.

(*c*) A criminal information was moved for againſt Mr. *Tweedale*, the magiſtrate who made the conviction for not ſtating all the evidence given: In fact a good deal of evidence was given on behalf of the defendant to ſhew that he was game-keeper of a certain manor, which the magiſtrate thought inſufficient for the purpoſe and convicted the defendant, only ſtating in the conviction, in the language of the act of parliament, that "on, &c. the defendant did keep and "uſe, &c." without ſtating the particulars of the evidence, and wholly omitting the evidence given for the defendant: But *The Court*, after hearing the affidavits on both ſides, being of opinion that the magiſtrate had not acted corruptly, but might have been miſled by the precedent in *R.* v. *Thompſon*, diſcharged the rule; expreſſing in ſtrong terms that they thought it the duty of magiſtrates in all caſes to ſtate the whole of the evidence, and not merely the reſult of it.

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Lord Kenyon, Ch. J. This was a motion to diſcharge the defendant out of cuſtody, and to quaſh a writ of excommunicato capiendo, which ſtated that the Biſhop of *Worceſter* had ſignified that the official of the Conſiſtorial Court of *Worceſter* in a certain cauſe of defamation or ſlander merely ſpiritual, between *Elizabeth* the wife of *William Hopkins* of the pariſh of *Grimby* in the county and dioceſe of *Worceſter* complainant and *Nathaniel Payton* of the pariſh of *Grimby* aforeſaid the party accuſed did, for the contumacy of the ſaid *Nathaniel Payton* in not appearing, decree him to be excommunicated.

To this writ three objections have been made.

1ſt, That the cauſes of excommunication are not ſufficiently ſtated.

2dly, That the ſentence is erroneous, in pronouncing the greater excommunication, inſtead of the leſſer.

3dly, Becauſe it does not appear that at the time of the ſentence the defendant was inhabiting within the dioceſe.

As to the firſt. The caſes cited were 1 *Rol. Rep.* 136. There *Fox* being taken on an excommunicato capiendo, the ſignificavit was that he was excommunicated for not anſwering articles, without ſhewing what; and this was held bad, as it did not appear what the nature of the charge was in thoſe articles. In that caſe *Arſcot*'s caſe is mentioned; where the excommunication was held bad, it only alleging that he was an inveterate ſchiſmatic. Another caſe was in *Salk.* 293., The *King* v. *Fowler*; where the writ was held bad, as the excommunication was recited to be pro quibuſdam cauſis ſubtractionis decimarum *ſive aliorum jurium eccleſiaſticorum*: this was held uncertain, as the alia jura might be matters not within their juriſdiction. But according to the report of this caſe in Lord *Raym.* 619. the reaſon aſſigned by *Holt* Ch. J. was, the not ſpecially aſſigning the reaſon of the excommunication but in the disjunctive, and *Gould* J. thought it good, as the *ſive* ſeemed to him accumulative; and *Holt* Ch. J. ſaid that if the writ had been in causâ ſubtractionis quorundam jurium eccleſiaſticorum, it had been well. But in the *King* v. *Smith*, *Strange* 946, an excommunicato capiendo was quaſhed, being in causâ defamationis ſive contumacii, for the uncertainty of the laſt word; but there was no objection on account of the firſt word not being ſufficiently certain and explicit. And in the *King* v. *Keat*, *Strange* 950., the Court held an excommunication for ſlander or defamation not bad for uncertainty.

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The preſent caſe is more certain than that, for it is alleged to be for defamation or ſlander *merely ſpiritual.* Thoſe words remove all doubt, ſhewing that this was within the cognizance of the ſpiritual court.

As to the 2d objection, that the party was only liable to the leſſer excommunication; that, if objectionable, is only the ground of appeal; it is merely that the judge has not proceeded according to the proper forms of the eccleſiaſtical court.

As to the 3d objection, the 23 *Hen.* 8. *c.* 9; *Moor* 467; *Latch.* 174; *Godbolt* 191; *Godolphin's Repertorium Canonicum* 635; and *Shower* 17. were cited. As to the ſtat. of *Hen.* 8. after reciting "that perſons had been cited in courts out of the dioceſes "where they lived, and on certificate thereof had been excommunicated, it provides that no perſon from thenceforth ſhould "be cited out of the dioceſe, in which he ſhould inhabit," but it does not prevent the ſentence of excommunication being paſſed againſt thoſe, who having been cited in their dioceſe may afterwards remove out of it. The caſe in *Latch.* 174. is *Brown*'s caſe. There the objection was, that the defendant was ſued out of his dioceſe. This caſe proves nothing; as the defendant muſt be underſtood to have been cited out of the dioceſe. *Godbolt* 191 is *Fraunces* and *Powell*'s caſe. It was a motion for a prohibition for citing the plaintiff out of his dioceſe contrary to the 23 *Hen.* 8., and there Lord *Coke* ſaid obiter that the 23 *H.* 8. was in affirmance of the common law; for if a man be excommunicated in a foreign dioceſe, the ſame is void and coram non judice; as appeared by the 8 *H.* 6. and 2 *H.* 4. But this doctrine muſt be underſtood from the reference to the 23 *H.* 8. as applying to the caſe of a citation out of the dioceſe. *Godolphin's Repert. Canon.* 635. only refers to *Moor* 467; which is *Beaumont*'s caſe, and is in theſe words; "*Beaumont* was taken on an excommunicato capiendo; and the "ſignificavit did not mention that he was commorant within the "dioceſe of the biſhop at the time of the excommunication, and "it was adjudged uncertain, and the party diſcharged." *Shower* 17. is *Johnſon*'s caſe; and that, as far as reſpects this caſe, is merely a reference to *Moor* 467; for the objection in that caſe was the want of an addition. With reſpect to the caſe in *Moor*; as the neceſſity of being commorant at the time of the excommunication is not found to be ſo determined in any other book, and as ſuch a doctrine would enable defendants, by ſhifting their dioceſe pending the ſuit, to avoid being amenable to the eccleſiaſtical court, that caſe muſt be underſtood as proceeding on the ground of the defendant's not being within the dioceſe at any time during the ſuit. But the authority of that caſe may well be doubted (a). For in the caſe of the *Queen* v. *Digg*, 11 *Mod.* 172., *Page* moved to quaſh a writ of excommunicato capiendo; his firſt exception being to the ſignificavit upon the excommunicato capiendo, that it did not appear he was commorant in the dioceſe; and he cited *Moor* 466, 467.: he took two other exceptions to the writ; and the report concludes with ſaying "which exception (namely the third) "the Court ſeemed to allow;" but no notice is taken of the firſt being allowed by the Court. And in Sir *T. Jones* 89. in the caſe of the Inhabitants of *Bermondſey*, *Darnel* prayed that the defendants might be diſcharged becauſe it did not appear by the certificate that they were commorant in the dioceſe of the biſhop at the time of the excommunication; and he relied on *Moor* 467. and *Latch.* 174. But the priſoners were remanded.

We are therefore of opinion, on conſideration, and on the examination of all theſe caſes, that none of the objections are well founded, and conſequently that

The rule muſt be diſcharged.

(a) It ſeems to have been over-ruled in *R.* v. *Burrard*, 1 *P. Wms.* 435.

Wedneſday, Feb. 8th.

The KING on the Proſecution of MOORE and Wife, and and Wife *againſt* WILKINSON.

A note for groats muſt be ſigned by all the creditors in the ſuit: if it be not, the defendant is entitled to be diſcharged, though he has received ſome payments under it.

IN this ejectment a verdict was taken for the plaintiff on one count, which ſtated a demiſe by *Moore* and wife, ſubject to an award; and the arbitrator having awarded a ſum of money to be paid by the defendant to all the leſſors of the plaintiff, he was attached for non-payment of that ſum, and was in cuſtody. He was afterwards brought up under the Lord's Act, but was remanded on receiving a note for his groats ſigned by *Moore* only; and under that note he received four payments. But

Marryat on a former day moved for his diſcharge, on account of this defect in the note for the groats, ſaying that the note ſhould have been ſigned by all the leſſors of the plaintiff; and that the application was made as ſoon as the defendant knew of the objection to the note.

Beſt, who oppoſed his diſcharge, produced an affidavit in which it was ſtated that *Moore* who ſigned the note was the only real creditor and at the whole expence of the ſuit. And he objected, on the authority of *Linch* v. *Pargiter* (*a*), to the defendant's being now diſcharged, after having received ſeveral payments under the note, even if the note were informal.

The Court, having ſome doubt on this caſe when the motion was made, declined deciding it at that time: but on this day they ſaid they were of opinion that the defendant was entitled to his diſcharge; and therefore they made

The rule abſolute.

(*a*) *Dougl.* 69.

Webster *againſt* De Tastet.

Wedneſday,
Feb. 8th.

Where a mate of a ſhip or a ſailor is to receive ſomething at the end of the voyage in lieu of wages, e. g. ſlaves, he cannot inſure it: nor can he recover the value of ſuch thing in an action againſt his agent for negligence in not procuring ſuch an inſurance.

THE plaintiff, having been hired to go as a mate in a ſhip from the coaſt of *Africa* to the *Havannah*, for which he was to receive wages at the rate of 5*l.* *per* month, and three privilege ſlaves free of expence on the ſhip's arriving at the port of ſale, directed the defendant, who was his agent at *Liverpool*, to get an inſurance on his privilege; and for the defendant's neglect the plaintiff brought this action on the caſe againſt him. It appeared at the trial at the laſt *Lancaſter* aſſizes before *Lawrence* J. that the ſhip was loſt on her voyage, and that the plaintiff thereby ſuſtained a loſs of 150*l.*, reckoning 39*l.* 5*s.* for his cheſt and clothes, and the reſt for the value of the ſlaves. It was objected on behalf of the defendant that the plaintiff could not recover the value of the ſlaves, becauſe they were not the legal ſubject of inſurance, they being in the nature of ſeamen's wages. That point was reſerved for the opinion of this court, a verdict being taken for the plaintiff for 150*l.*, with liberty to the defendant to move to reduce the damages to 39*l.* 5*s.* Accordingly

Ward on a former day obtained a rule for that purpoſe, which was now oppoſed by

Holroyd; who admitted that if a policy had been effected, the plaintiff could not have recovered the value of the privilege ſlaves in an action againſt the underwriters, but contended that, as in point of fact theſe kind of ſlaves were frequently the ſubject of inſurance by mates at *Liverpool* where the loſs was always paid by the underwriters without diſputing the queſtion, the plaintiff might recover the value of them in this action, becauſe by means of

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the defendant's negligence the plaintiff had ſuſtained the loſs. But

The Court were clearly of opinion that the ſlaves were not the ſubject of inſurance, and that the plaintiff could not recover in this action more than he could have recovered in an action againſt the underwriters. They therefore made the rule abſolute to reduce the damages to 39 *l.* 5 *s.*

Rule abſolute.

Wedneſday, Feb. 8th.

Senat *againſt* Porter.

The plaintiff's agent ſhewed to the defendant, an underwriter, the captain's proteſt containing an account of the loſs of the ſhip inſured, demanding payment: held that this did not entitle the defendant to read the proteſt in evidence in an action on the policy.

On the trial of this action on a policy of inſurance at the Guildhall Sittings before Lord *Kenyon* a queſtion aroſe reſpecting the admiſſibility in evidence of the captain's proteſt. The facts were theſe; when *Vaux*, the broker, applied to the defendant informing him of the loſs and demanding payment, he produced the different papers relating to the ſubject, and among the reſt the proteſt ſigned by the captain; the defendant told him he had looked into the papers, but that "there was a point in the caſe," and he refuſed payment. On the part of the defendant it was contended that the proteſt was made evidence in this caſe by the plaintiff as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment. Lord *Kenyon* was clearly of opinion that the proteſt was not admiſſible in evidence, and the plaintiff obtained a verdict.

On a former day in this term the Court reluctantly granted a rule calling on the plaintiff to ſhew cauſe why there ſhould not be a new trial, on the ground that the proteſt ought to have been received in evidence: that rule was now ſupported by

Gibbs, who argued it on the ground above ſtated.

Erſkine, *Law*, and *Giles*, were to have ſhewn cauſe againſt the rule, but were ſtopped by the Court.

Lord Kenyon, Ch. J. Great complaints have been made in the commercial world, and not without reaſon, of the enormous expence attending the trials of inſurance cauſes; it therefore becomes the Court not to ſuffer that expence to be encreaſed by unneceſſary motions; and it was with great reluctance that I was

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SENAT *againſt* PORTER.

induced to conſent to grant the rule to ſhew cauſe in this caſe. I have conſidered and reconſidered this queſtion, and I cannot figure to my imagination any arguable point in it. That the proteſt per ſe cannot be evidence is admitted. Then what facts were proved to make it evidence in this caſe? why, that it was in *Vaux*'s hands, and that he ſhewed it to the defendant on an application for payment. But if that circumſtance would render the proteſt evidence, it might equally be argued that the allegations in a plaintiff's bill in equity might be read againſt him merely becauſe the bill with its contents muſt have been ſhewn to the defendant; but that cannot be pretended. If the plaintiff had availed himſelf of any part of this paper to prove his caſe, the defendant would have been entitled to read the whole of it: but the mere circumſtance of *Vaux*'s ſhewing the proteſt to the defendant when he applied to him for payment ſurely cannot render the proteſt evidence in this caſe.

GROSE, J. This proteſt was merely produced to the defendant as a paper containing the account of the loſs given by the captain: if the captain had been called as a witneſs and had given a different account of the loſs from that contained in the proteſt, the proteſt might have been produced to ſhew that he was not worthy of credit; but it could not be read on behalf of the defendant to prove any fact in the caſe.

LAWRENCE, J. It ſeems to me that the proteſt does not become evidence on account of it's having been voluntarily ſhewn by *Vaux* to the defendant any more than it would if the plaintiff had been compelled by a Judge's ſummons to ſhew it to the defendant. It was not neceſſary for the plaintiff to ſhew this proteſt to the defendant before he brought his action; but the defendant might have obtained a Judge's ſummons to compel him to permit the defendant to inſpect the paper; inſtead of this *Vaux*, the plaintiff's agent, who wiſhed to act candidly, voluntarily ſhewed this as well as the other papers to the defendant: but that does not amount to an admiſſion of the facts contained in the paper.

Rule diſcharged.

Wedneſday, Feb. 8th.

LAW *againſt* HOLLINGSWORTH.

A ſhip homeward bound to the port of *London* received a pilot at *Orfordneſs* as directed by 5 *G.* 2. *c.* 20. and dropped him before ſhe reached her moorings in the river *Thames*; after which, before ſhe was ſafely moored, an accident happened and the veſſel was ſunk: the underwriter on the ſhip and cargo was held diſcharged from his liability on account of there not being any pilot on board at that time; though it did not appear that the loſs was directly imputable to want of ſkill in thoſe who navigated the veſſel. *Qu.* Whether it is eſſentially neceſſary to the aſſured's right of action on ſuch a policy that the pilot taken in to navigate up the *Thames* ſhould be duly qualified according to the directions of the 5 *G.* 2. *c.* 20.?

ACTION on a policy of inſurance on ſhips and goods from *Stetten* to *London*, in which the plaintiff declared upon a loſs by reaſon of the veſſel's ſinking before ſhe had been moored twenty-four hours in conſequence of an anchor's having been driven into her. It appeared that the captain had taken a pilot on board at *Orfordneſs* on entering the river *Thames*, who quitted her at *Halfway Reach;* after which and before ſhe had come to her moorings higher up the river the accident happened, which occaſioned the loſs, and in conſequence of which the veſſel filled with water before ſhe had been moored twenty-four hours. But the preciſe time at which the damage was ſuſtained within thoſe limits, or by what particular default, was not aſcertained. The captain had alſo left the ſhip before the time of the actual loſs. It further appeared that the pilot taken in at *Orfordneſs* was not properly qualified at the time according to the proviſions of the 5 *Geo.* 2. *c.* 20. for the regulation of pilots on the river *Thames:* but it did not appear that this was known to the captain; and ſince that time the pilot had received his regular qualification. The plaintiff obtained a verdict, to ſet aſide which a rule to ſhew cauſe was obtained on a former day upon two grounds; 1ſt, That the requiſitions of the ſtatute not having been complied with, the plaintiff was not entitled to recover in point of law, it being an implied condition in every policy that the ſhip ſhall be navigated according to law. 2dly, That the underwriter was diſcharged on the ground of actual negligence in the management of the ſhip, by not keeping the pilot on board till the ſhip had been moored in ſafety.

On the firſt ground there was much argument at the bar on the application of the ſtat. 5 *Geo.* 2. to a caſe like the preſent, and how far it was neceſſary to the validity of a policy that the directions of that ſtatute in reſpect to pilots ſhould be ſtrictly complied with: but the conſideration of this queſtion became ultimately unneceſſary on the ground on which the Court determined the caſe; and therefore the arguments are here omitted.

Erſkine, *Garrow*, and *Lawes*, ſhewed cauſe; and contended, on the ſecond ground, that there was no proof of any actual negligence in the perſon who piloted the veſſel, or in any other perſon on board the ſhip. That the only implied condition of this nature between the underwriter and the aſſured was, that the ſhip ſhould be navigated with all ordinary ſkill and care; in which reſpect there was no evidence here of any deficiency; but the loſs was ſolely imputable to an accident which no ſkill or foreſight could have prevented. The loſs therefore not being imputable to the abſence of a qualified pilot, the underwriter cannot object to the right of action on that ground, unleſs the Court ſhould be of opinion that the act of parliament makes the preſence of ſuch a perſon on board the ſhip during it's progreſs up the river a ſtrict condition precedent to the plaintiff's right to recover.

Law and *Bailey* contrà. The want of a proper pilot on board the ſhip at the time when the accident happened is negligence in fact, as well as a conſtructive negligence upon the ſtrict conſtruction of the act of *Geo.* 2. The navigation of the river *Thames* is known to be intricate and dangerous, and is indeed ſo declared to be by the Legiſlature, which was the reaſon for paſſing that ſtatute; and therefore it was neceſſary to have a ſkilful pilot on board. But it is a ſufficient anſwer to the action in this caſe to inſiſt upon the known uſage of trade, which is, to have ſuch a pilot on board during the progreſs of a veſſel up the river, and the underwriter has a right to expect that all ordinary precaution and care ſhall be taken to navigate the veſſel ſafely; which was omitted to be done in the preſent caſe by the pilot's being permitted to leave his charge before the veſſel was moored in ſafety. It is no anſwer to ſay that the loſs did not ariſe from that circumſtance; for non conſtat that the accident would have happened if the pilot had remained on board: and at any rate the underwriter was diſcharged by the groſs negligence of thoſe who had the conducting of the ſhip, which was a breach of the condition implied in the policy.

Lord KENYON, Ch. J. The principle on which this caſe muſt be determined ſeems to be admitted on all hands, namely, that the aſſured cannot recover on a policy of aſſurance, unleſs they equip the ſhip with every thing neceſſary to her navigation during the voyage; the ſhip herſelf muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill. I do not feel that I am bound in this caſe to decide whether or not it be neceſſary that there ſhould be on board the veſſel a pilot qualified according to the act of parliament referred to. This caſe may be diſpoſed of without deciding that queſtion. It might be contended,

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though with what effect I will not ſay, that if the captain had taken a pilot who repreſented himſelf to be duly qualified, and whom the captain believed to be ſo, but who in fact had not a qualification, the captain would have diſcharged his duty, and the underwriters would have been anſwerable for any loſs that had happened. But in this caſe the captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there ſhall be ſome perſon on board the ſhip apparently qualified to navigate her. If the underwriters had been previouſly informed that there would be no pilot on board during the ſhip's ſailing up the river *Thames*, probably they would not have undertaken the riſk. On the ground therefore that there was *no pilot* on board the veſſel when the accident happened, I am of opinion that there muſt be judgment of nonſuit.

GROSE, J. The queſtion is not, Whether the aſſured can recover in a caſe where there was a pilot on board, though not properly qualified, but, Whether or not the defendant be liable for a loſs which happened to the veſſel when there was no pilot of any kind on board? I think he is not, becauſe it is underſtood in all contracts of inſurance that there ſhall be ſuch a perſon on board the ſhip.

LAWRENCE, J. In this caſe there was groſs negligence in the captain, in having no perſon on board to take care of the ſhip, and on that ground I think the plaintiff cannot recover. It is not neceſſary to decide here whether the defendant would have been anſwerable if there had been a pilot on board, whom the captain believed to be of ſufficient ſkill, but who was not duly qualified under the act of parliament.

Rule abſolute.

Thurſday, Feb. 9th.

MIDDLEWOOD *againſt* BLAKES.

A ſhip inſured from *A.* to *B.* ſails with intent to touch at *C.*, an intermediate point; to a certain point the voyage is the ſame; from that point there are three tracks to *B.*, one by the way of *C.* the two others by different courſes; there are advantages and diſadvantages attending each, and the captain muſt elect according to circumſtances: the ſhip takes the track by *C.* with intent to put in there, but is taken before ſhe actually comes to the point where ſhe muſt have turned out of the track to *B.* by the way of *C.* for the purpoſe of putting into the harbour of *C.*; yet the underwriter is diſcharged; becauſe he was entitled to the advantage of the captain's judgment in electing which of the three tracks it was beſt to purſue when he came to the firſt dividing point.

THIS was an action on a policy of aſſurance on goods on board the ſhip *Arethuſa* "at and from *London* to *Jamaica*." The ſhip was captured by an enemy in her voyage out on the

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north ſide of *St. Domingo*, and carried into the *Spaniſh* port of that name: and the aſſured declared as for a total loſs by capture. The defendant paid the premium into court; and reſiſted the demand on the ground of a deviation from the voyage inſured; As to which it appeared in evidence that the ſhip was entered outwards at the Cuſtom-houſe, and the clearance of the goods was for *Jamaica* only, but that ſhe ſailed from *London* with directions to the captain to touch in his way to *Jamaica* at *Cape Nicola Mole* in the Iſland of *St. Domingo* in order to land ſome ſtores there purſuant to a charter-party entered into for that purpoſe; after which he was to proceed to *Jamaica*. The iſland of *St. Domingo* lies in the track to *Jamaica;* and conſequently the courſe of the voyage from *London* to *Jamaica*, and from *London* to *Cape Nicola Mole*, is to a certain point exactly the ſame. From that point there are three tracks which a ſhip bound on the voyage to *Jamaica* may take; one of them to the ſouthward immediately of *St. Domingo*, another ſtill further to the ſouthward, and a third to the northward of that iſland; in which latter after the ſhip in queſtion had paſſed the dividing point of the three ſeveral tracks, but before ſhe had reached the ſubdividing point of the continuing courſe to *Jamaica* and that leading into the port of *Cape Nicola Mole*, ſhe was captured. With reſpect to the three ſeveral tracks to *Jamaica* from the dividing point which the ſhip paſſed, it appeared that thoſe to the ſouthward of *St. Domingo* were the moſt uſual, eſpecially in time of peace, and were the ſafeſt navigation; that the other to the northward was the ſhorteſt, but more difficult navigation, but was ſometimes preferred in time of war by thoſe who were acquainted with it, more eſpecially in the preſent war, becauſe great part of the iſland of *St. Domingo*, including *Cape Nicola Mole*, being in poſſeſſion of the *Britiſh* force, there was leſs riſk to be apprehended from privateers. But whether this or either of the other courſes was the moſt advantageous to be purſued in any particular inſtance depended upon circumſtances, upon which it was proper for the captain of the ſhip to exerciſe his judgment at the time. It was not pretended that the captain had in fact exerciſed any ſuch judgment in ſelecting this courſe which he had taken; but it was evident that he had adopted it as the moſt direct and proper one to be taken for the purpoſe of going in to the *Cape*, whither he was then bound.

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Lord *Kenyon* before whom the caſe was tried was of opinion that the defendant was diſcharged under theſe circumſtances, becauſe at the time when the ſhip was captured ſhe was bound to a different place from that for which ſhe was inſured, and with a view to which the captain under compulſion of his orders had taken this particular track, and was not left at liberty to exerciſe his judgment at the dividing point for the benefit of all concerned, as the aſſurers had a right to inſiſt upon. And accordingly the Jury found a verdict for the defendant, being, as they ſtated, unanimouſly of opinion that "the concealment of the "intention to go to *St. Domingo* vitiated the policy." A rule having been obtained calling on the defendant to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial granted,

Garrow and *Gibbs* now ſhewed cauſe. At the time of the capture the ſhip was ſailing upon a different voyage from the one inſured; and if the voyage inſured ever had an inception at all, at leaſt the deviation commenced from the dividing point; for from thence the captain took the northern courſe, not electing it as one of the ſeveral tracks to *Jamaica*, but as the proper way to *Cape Nicola Mole*. And the going there was a deception upon the underwriters; becauſe they muſt be taken to have known the uſual courſe of the voyage inſured, that the ſouthern track was the moſt uſual and ſafe, though circumſtances might exiſt at the time to make the northern one more eligible. They had a right therefore to expect that the captain would be at liberty when he came to the dividing point to ſelect which of the paſſages he thought the moſt eligible: but it now appears that the captain had no ſuch right of election, but was bound to go to *Cape Nicola Mole* firſt, however circumſtances might have rendered that track the moſt hazardous, as indeed it appeared by the evidence to be at all times in reſpect to the navigation. The defendant's objection therefore is not that the captain elected to go this way, but that he could properly go no other way than this in conſequence of his orders; and conſequently this was ſuch an alteration of the riſk inſured as avoids the policy.

Erſkine, *Law*, and *Giles*, in ſupport of the rule. This caſe comes directly within the principle of thoſe authorities in which it has been determined that where the terminus a quo and terminus ad quem remain the ſame, though there be an intention to deviate from the voyage inſured, yet that ſhall not vitiate the policy if the

the loſs happen before the dividing point. Such were the caſes of *Foſter* v. *Wilmer* (*a*), *Carter* v. *The Royal Exchange Aſſurance Company* (*b*), *Thelluſon* v. *Erguſſon* (*c*), *Kewley* v. *Ryan* (*d*), and *Kingſton* v. *Phelps* before Lord *Kenyon* at the ſittings about two years ago. In the laſt caſe the inſurance was from *Cork* to *London*, the captain ſailed with an intention of touching at *Weymouth* in his way, but before he had actually deviated for that purpoſe, a violent ſtorm aroſe, and he was ultimately driven by ſtreſs of weather into the very port of *Weymouth*: Lord *Kenyon* held that the underwriter was bound notwithſtanding the intention to deviate, inaſmuch as the actual deviation aroſe ultimately from inevitable neceſſity, and not from choice; and the plaintiff recovered. The caſes of *Woolridge* v. *Boydell* (*e*), and *Way* v. *Modigliani* (*f*), are diſtinguiſhable from the preſent. In the former the underwriter was held diſcharged, becauſe the termini were not the ſame; the ſhip was inſured from *Maryland* to *Cadiz*, and ſhe ſailed for *Falmouth*, never intending to go to *Cadiz* at all; therefore there never was any inception of the voyage inſured. In the caſe of *Way* v. *Modigliani* the ſhip went entirely out of the courſe of the voyage inſured upon a different deſtination, though ſhe afterwards got into the track of the voyage inſured. That therefore was either a caſe of non-inception of the voyage inſured, or of direct deviation from the courſe of it. It is clear then from a review of all the caſes upon the ſubject that if there had been but one uſual track to *Jamaica*, namely, to the northward of *St. Domingo*, the plaintiff muſt have been entitled to recover; inaſmuch as the loſs happened before the intended deviation took place, and while the veſſel was yet in the direct courſe to *Jamaica*. Then it cannot make any difference that there are ſeveral tracks to *Jamaica*, neither of the others having any general ſuperior advantage to the preſent. But it is ſaid that the captain was by force of his orders deprived of the right of exerciſing his judgment as to which of the paſſages he would elect: yet that can make no difference; becauſe ſo long as the ſhip is in the direct courſe to the place inſured the underwriter is not injured. It could have been no fraud upon him if the owner had predetermined that the ſhip ſhould proceed by the

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(*a*) 2 *Stra.* 1249.
(*b*) *Ibid.*
(*c*) *Dougl.* 361. oct. ed.
(*d*) 2 *H. Blac.* 343.
(*e*) *Dougl.* 16.
(*f*) *Ante*, 2 vol. 30.

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north paſſage, without any intention to deviate. It was never doubted but that a ſhip-owner might elect which track he pleaſed, provided he confined himſelf to one which was direct and proper. It is not contended that this was not ſo; and indeed it appeared to be the neareſt, and, ſince the poſſeſſion of the *Cape* by the *Engliſh*, the ſafeſt. Neither was the captain in fact bound by his inſtructions to go to the northward; for he might juſt as well have gone to the ſouthward, even with a view of going to *Cape Nicola Mole*. Though this objection of fettering the captain's diſcretion was not directly taken in any of the caſes, yet it has occurred in fact in ſeveral, and particularly in *Thelluſſon* v. *Ferguſſon* (*a*) before mentioned; where the ſhip being inſured for *Havre*, but intending to go to *Breſt*, was actually taken in a track more direct for *Breſt* than for *Havre;* yet that being proved to be at leaſt as good if not a ſafer way of getting to *Havre*, even if ſhe had not intended to deviate, the underwriter was held liable. If this had been a new queſtion, perhaps it might without inconvenience have received a different determination: but the rule is now too well ſettled to be ſhaken. It is true that the underwriter ought to be fairly apprized of all the circumſtances which are material to his intereſt, as tending to vary the riſk inſured. And in ſuch a caſe it may be ſaid that though the ſhip be loſt after ſhe has deviated, the underwriter may not be in a ſituation to prove the deviation. But the fair anſwer is that the aſſured muſt prove the loſs; and that being a matter of locality, he muſt neceſſarily prove the place where it happened; except in the ſingle inſtance of a veſſel's foundering at ſea and all the crew periſhing, which ſeldom occurs. In every other caſe the underwriter has an opportunity of knowing with certainty whether the ſhip was in the direct track of her voyage at the time of the loſs; and that is a more certain ſtandard whereby to decide the intereſts of the reſpective parties, than any thing which reſts merely in intention. A contrary rule in ſuch a caſe precludes the ſuppoſition, which is by no means impoſſible, that the intention to deviate may be abandoned before the actual dividing point. Here the only deviation would have been if the ſhip had actually turned on one ſide in order to put into *Cape Nicola Mole;* and as the loſs happened before, non conſtat that ſhe would have deviated at all. At leaſt the riſk of the under-

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(*a*) *Dougl.* 361.

Middlewood *againſt* **Blakes.**

writer up to the time of the loſs remained the ſame as if no ſuch intention had ever been entertained.

Lord Kenyon, Ch. J. I will not now inquire whether the caſes cited were or were not properly decided; though perhaps if this were res integra I ſhould have entertained ſome doubts. It is ſufficient that thoſe caſes have been decided, and if the opinion which I gave at the trial tended to ſhake their authority I would abandon it: but it ſeems to me that our determination in favor of this defendant will not diſturb any of the authorities. At the trial ſix witneſſes, who had gone many voyages to *Jamaica*, were examined on the part of the plaintiff reſpecting the common courſe of the voyage; two of whom had never taken the northern paſſage, and the other four ſaid that the ſouthern was the moſt uſual, and that at all events the captain ought to exerciſe his diſcretion in each particular caſe whether he ſhould take the one courſe or the other. When this policy was ſubſcribed, it muſt be taken for granted that the defendant knew what was the common courſe of the trade, and expected that the moſt expedient voyage would be purſued by the captain, acting on the emergency of the occaſion: but in fact that diſcretion of the captain was taken away in this inſtance, and on that I formed my opinion. That was a moſt important fact, and ought to have been communicated to the underwriters. I am therefore of opinion that the plaintiff is not entitled to recover, and that the rule for a new trial muſt be diſcharged.

Ashhurst, J. The facts of this caſe being once underſtood, I think there can be no doubt in the queſtion. The underwriters ſuppoſed when they made this inſurance that the captain would have gone the moſt common and uſual way, or at leaſt that he would have been at liberty to exerciſe his own judgment on the ſubject; inſtead of which it appears that he had no diſcretion, but was bound to take the northern paſſage. Had the intention of going to *St. Domingo* firſt been communicated to the underwriters, perhaps they would not have ſubſcribed the policy, or if they had would have required a larger premium. Therefore on the ground that a full diſcloſure was not made to the defendant when he underwrote the policy in queſtion, I think the rule ought to be diſcharged.

Grose, J. If this caſe clearly fell within thoſe which have been cited, I ſhould on that ground have been induced to determine in favor of the plaintiff; it being highly beneficial to the ſubject to adhere to former deciſions. But this caſe is diſtinguiſhable from them; for in thoſe caſes the ſhip was taken before the dividing point, and when ſhe was going in the only courſe ſhe could take in order to arrive at her place of deſtination. There being no caſe to guide us in the deciſion of this, we muſt reſort to principle. Now it muſt be remembered that this cauſe was tried by a ſpecial Jury of merchants of *London*, perſons peculiarly converſant in commercial tranſactions, and who perfectly well knew the ordinary riſk of ſuch a voyage, and what would vary that riſk; and they were of opinion that the underwriter was not liable. It appears that there are ſeveral courſes to be taken to go to *Jamaica*, that the moſt uſual paſſage is the ſouthern one, but that the captain ought to have a diſcretion to purſue that which at the moment appears to be moſt adviſable: but in this inſtance the captain had no ſuch diſcretion; that circumſtance ſhould have been diſcloſed to the underwriters, and that not having been done I think the plaintiff cannot recover. The determination to take the northern paſſage at all events might very materially vary the riſk; for when the ſhip came to the dividing point, the captain might diſcover that the northern paſſage was more dangerous owing to the circumſtances of the moment, and yet he was obliged to take that courſe in this inſtance, when the underwriters ſuppoſed that he had a diſcretion to take either the northern or the ſouthern paſſage as he ſhould think right.

Lawrence, J. When the motion for a new trial was made, I was inclined to think that this caſe fell within the authority of the ſeveral caſes cited, and that as the ſhip was taken in the courſe of her voyage to *Jamaica* without ſtopping at *St. Domingo* the plaintiff was entitled to recover: but in the courſe of this diſcuſſion I have changed my opinion. The principle on which the caſes alluded to have been determined is, that where the ſhip is taken before ſhe comes to the dividing point the underwriters run no additional riſk by the captain's intention to deviate afterwards, and therefore it is to be conſidered as if no ſuch intention had been formed. Now if in this caſe the ſhip had been captured before ſhe took the northern courſe, I ſhould have thought that the plaintiff would have been entitled to a verdict; for in that caſe the ſhip would have run no additional riſk: but here ſhe ſailed for *Jamaica* having a charter-party to ſtop at *St. Domingo*, and when ſhe

ſhe came to the dividing point, which I conſider in this caſe to be that where ſhe begun to take the northern courſe, the ſhip was ſubjected to a riſk for which the underwriters did not make themſelves reſponſible; for at that moment the underwriters were entitled to have the benefit of the exerciſe of the captain's judgment whether he would go to the north or to the ſouth. If it had appeared that the captain had really exerciſed his judgment in this caſe, and that he had taken the northern courſe as in his opinion the beſt at that time without being influenced by the charter-party to go to *St. Domingo*, I ſhould have thought that a new trial ought to be granted: but I underſtand that he took this courſe, not after exerciſing his judgment, but becauſe he was bound to go to *Cape Nicola Mole*; and therefore there is no ground for ſending this to a new trial though the jury have decided for the plaintiff on another ground which in my opinion is not tenable.

Rule diſcharged.

The KING *againſt* C. BALDWIN, Eſq. and Others.

Friday, Feb. 10th.

The magiſtrates are not bound to appoint ſurveyors of the highways from the liſt of perſons returned to them under ſtat. 13 *G.* 3. *c.* 78. if in their opinions the perſons named in the liſt are not qualified: but they may appoint other perſons of the pariſh who are qualified.

THIS was a rule to ſhew cauſe why a mandamus ſhould not iſſue to the four defendants and the other juſtices of the peace in and for the county of *Surry* acting within the limits where the pariſh of *Batterſea* lies, commanding them to nominate and appoint one or more perſon or perſons named in the liſt of twenty-one perſons made and returned to them according to the direction of the ſtatutes in that caſe made and provided at a ſpecial Seſſions held at *Wandſworth* in and for the ſaid county on the 15th of *October* laſt, as fit perſons to take the office of ſurveyors of the highways of the pariſh of *Batterſea* for this year. It appeared from the affidavits that on the 22d of *September* laſt at a pariſh meeting convened according to the directions of the general highway act a liſt of twenty-one perſons was made, among whom were *V. Kerton* and *R. Southby*, and was delivered to the juſtices &c. That on the 5th of *November* following the defendants appointed *V. Kerton R. Southby* and one *W. Chivers* (who was not named in the liſt) ſurveyors for the year: they were not appointed ſurveyors for the whole pariſh, but each of them for a particular diviſion, *W. Chivers* being appointed for

Batterſea

Batterſea Riſe diviſion within the pariſh of *Batterſea*. It alſo appeared that the juſtices had been for ſeveral years paſt in the habit of appointing ſeveral ſurveyors for diſtinct parts or diviſions of the pariſh, and not for the whole pariſh; that perſons ſo appointed have raiſed money in their own particular diviſions, and laid out the ſame in repairing the roads in thoſe diviſions. The ground of the motion for the mandamus was that the juſtices had not appointed all the three ſurveyors from the liſt of twenty-one perſons returned to them.

Garrow ſhewed cauſe againſt the rule; and relied on the words of the ſtat. 13 *Geo.* 3. *c.* 78. *ſ.* 1. (*a*) to ſhew that the magiſtrates were not bound in all caſes to appoint the ſurveyors from the perſons mentioned in the liſt returned to them, but that they had a diſcretionary power to appoint other perſons who were duly qualified, if in their opinion ſuch perſons were better qualified for the office than thoſe returned in the liſt.

Erſkine and *Lawes*, in ſupport of the rule, again inſiſted on the objection before taken; and mentioned another objection to the appointment of the three ſurveyors, namely, that they were not appointed for the whole pariſh (*b*), but only for inferior diſtricts within the pariſh.

Lord Kenyon, Ch. J. By the firſt ſection in the act of parliament, if the liſt of perſons returned to the juſtices does not contain the names of perſons whom the juſtices think qualified, the juſtices may appoint any other perſons of the pariſh who are properly qualified. If indeed the magiſtrates act corruptly, they may be puniſhed for an abuſe of their diſcretionary power: but no corruption is even ſuggeſted in this caſe. The liſts are directed by the act only for the purpoſe of aſſiſting the magiſtrates,

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(*a*) It is enacted by that ſtatute that the conſtables &c. (the perſons conſtituting the pariſh meeting) ſhall make a liſt of the names of at leaſt ten perſons living within the pariſh townſhip or place who has each an eſtate in lands &c. of 10 *l.* a year, or a perſonal eſtate of 100 *l.*, or who occupies lands of the yearly value of 10 *l.*; if there be not ten perſons having ſuch qualifications, that then they ſhall inſert in the liſt the names of ſo many perſons as are qualified, together with ſo many of the moſt ſufficient and able inhabitants as ſhall make up the number, to ſerve the office of ſurveyor of the highways &c. The act then directs that a duplicate of that liſt ſhall be ſent to the juſtices, and that the juſtices ſhall appoint a petty ſeſſions &c, "and from the ſaid liſts according to their diſcretion and the largeneſs of the pariſh townſhip or place by warrant under their hands and ſeals ſhall appoint one two or more of ſuch perſons, *if he or they ſhall in the opinion of ſuch juſtices be qualified for the office of ſurveyor*, if not, one two or more of the other ſubſtantial inhabitants or occupiers of lands &c. within ſuch pariſh &c. fit and proper to ſerve the office of ſurveyor of the highways *for ſuch pariſh townſhip or place*."

(*b*) The words of the act are "pariſh, townſhip, or place."

who in many inſtances might not perhaps know a ſufficient number of perſons fit to ſerve the office. With regard to the ſecond objection; it appears that this has been the mode of appointing ſurveyors in this pariſh for ſeveral years paſt. And in many other parts of the country the ſurveyors are appointed for townſhips and other ſmall diſtricts. But at any rate, if there be any objection to the appointment of the ſurveyors, the party objecting ſhould firſt remove the appointments by certiorari, and then move to quaſh them.

Per Curiam, Rule diſcharged.

WALKER *againſt* The Earl of GROSVENOR.

Friday, Feb. 10th.

The Court will not grant an attachment againſt a peer for not paying a ſum of money awarded, though the defendant conſent on condition that the attachment ſhall lie in the office for a certain time.

PARK moved for an attachment againſt the defendant for nonpayment of the ſum of 2711 *l.* purſuant to an award, which had been made under a rule at niſi prius, afterwards made a rule of this court; and he obſerved that, unleſs this application were granted, the plaintiff would be without remedy, as no verdict had been taken.

Bayley was inſtructed on the part of the defendant to conſent, provided the attachment lay in the office until the firſt day of next term. But

The Court ſaid that ſuch an attachment could not be granted in this caſe, the defendant being a peer of the realm.

Rule refuſed.

BAKER *againſt* LISCOE.

Friday, Feb. 10th.

In an action againſt a wharfinger to whom goods were ſent to be ſhipped, for neglecting to take out a ſufferance, for want of which the goods were ſeized, it is not neceſſary to aver or prove that the goods were condemned by a ſentence in rem. But it is ſufficient to aver that "for want of ſuch ſufferance the ſaid goods were *ſeized as forfeited,* whereby the ſame became "wholly loſt to the plaintiff;" and proof of a ſeizure in fact by the officer for a juſt cauſe of forfeiture is ſufficient to ſuſtain the declaration.

THIS was an action on promiſes, in which the declaration ſtated that in conſideration that the plaintiff would deliver certain goods to the defendant (a wharfinger) at his wharf to be ſhipped by him for a certain reward with a ſufferance or warrant, he, the defendant, undertook to procure a ſufferance from the cuſtom-houſe; that the plaintiff in conſequence delivered the goods to the defendant; but that the defendant did not procure

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a ſufferance according to his undertaking, by means whereof and for want of ſuch ſufferance *the ſaid goods were ſeized as forfeited to our Lord the King, whereby the ſame became wholly loſt to the plaintiff.* It appeared in evidence at the trial that the plaintiff's goods had been ſent to the defendant's wharf in the uſual courſe of buſineſs to be ſhipped by him; and that it was part of the wharfinger's buſineſs to obtain the ſufferance from the cuſtom-houſe for ſhipping the goods, for want of which they had been ſeized by a cuſtom-houſe officer, and ſome time afterwards ſold in the uſual manner. It was ſuggeſted that the ſale had been made under a ſentence of condemnation in the Court of Exchequer, and that was probably the fact: but the record itſelf of ſuch ſentence was not given in evidence, which was contended on the part of the defendant to be neceſſary in ſupport of the action. The plaintiff however recovered a verdict, with leave to the defendant's counſel to move to ſet it aſide and enter a nonſuit, if the Court ſhould be of that opinion.

Mingay afterwards obtained a rule calling on the plaintiff to ſhew cauſe why a nonſuit ſhould not be entered, with liberty afterwards to move in arreſt of judgment, upon the ground either that there was not a ſufficient averment in the declaration that the goods had been condemned as forfeited, or if ſo, that there was not ſufficient legal evidence of ſuch condemnation, by the non-production of the record itſelf.

Erſkine, *Gibbs*, and *Vaughan*, ſhewed cauſe. It is admitted that the goods were ſent to the defendant, that it was his duty to have taken out a ſufferance, that he did not do ſo, and that in conſequence there was a ſeizure in fact by the king's officers as for a forfeiture, and a ſale by the ſame. It appears therefore that by the negligence of the defendant the plaintiff has loſt his goods; which being the caſe, the defendant is liable to make good that loſs, independently of the exiſtence of any ſentence of condemnation. For as ſoon as they were ſeized by the officer for a juſt cauſe, the plaintiff had a right to abandon them altogether to the defendant. Here it appears that the cauſe of ſeizure was juſt, becauſe the ſufferance not having been taken out, the act of the 13 & 14 *Car.* 2. *c.* 11. *ſ.* 15. attached, and gave the right to ſeize as forfeited. This action therefore being maintainable even before ſentence of condemnation could have been had, it follows that

that neither the averment or the proof required was neceſſary. Perhaps the mere proof of a ſeizure would not have been ſufficient: but where it is alſo ſhewn that the goods were forfeitable by law, that is enough; becauſe thereby the property, as well as the poſſeſſion, was deveſted out of the owner. As in *Wilkins* v. *Deſpard* (*a*), where a ſhip having been ſeized as forfeited under the navigation act (*b*) by a governor of one of the colonies, it was held that the owner could not maintain treſpaſs againſt the party ſeizing, though he did not proceed to condemnation; becauſe by the forfeiture the property was deveſted out of the owner before condemnation. This being an application to enter a nonſuit, it is a ſufficient anſwer that the declaration, which only ſtates that the goods were *ſeized as forfeited*, and not that they were condemned, was proved.

Mingay and *Lawes* contrà. In order to ſuſtain this action it was neceſſary for the plaintiff to aver and prove that the goods had been legally ſeized and condemned as forfeited; for otherwiſe the defendant might be made reſponſible for the acts of a wrong-doer. It is obſervable that the declaration does not even allege that the want of a ſufferance was a *legal cauſe of forfeiture*, or that the goods *were forfeited*; but only that they were *ſeized as forfeited:* and therefore the concluſion, that "they were thereby "wholly loſt to the plaintiff," does not follow from the premiſes. But if ſuch an allegation be ſufficient, it can only be ſo upon the ground that the legal intendment is that the goods were *legally* forfeited. But if that intendment is to be made, then the proof was deficient in this caſe, becauſe the beſt evidence of the fact was not adduced; namely an office copy of the record of condemnation. The only evidence given was of a ſeizure and ſale in fact; which, for aught appears, may have been by wrong-doers without any legal authority. In *Wilkins* v. *Deſpard* the legality of the ſeizure was admitted in the pleadings; and the queſtion of evidence never came before the court. The objection therefore either applies in arreſt of judgment, becauſe there is no ſufficient averment that the goods were forfeited or condemned; or it applies for the purpoſe of entering a nonſuit, on the ground that the declaration was not proved.

Lord KENYON, Ch. J. When the objection was firſt made, I was rather inclined to think that it was well founded: but I am

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(*a*) *Ante*, 5 vol. 112.

(*b*) 12 *Car.* 2. *c.* 18.

now ſatisfied that it ought not to prevail. It is alleged in the declaration that the defendant engaged to procure a ſufferance, that he did not, and that for want of it the goods were ſeized as forfeited, whereby they were wholly loſt to the plaintiff. This therefore was an injury ſuſtained by the plaintiff in conſequence of the defendant's negligence. Suppoſe there was no condemnation in the Court of Exchequer, the plaintiff might have recovered a ſatisfaction of the defendant for this loſs.

ASHHURST, J. and *Groſe*, J. declared themſelves of the ſame opinion.

LAWRENCE, J. Sufficient appears to ſhew that the goods were not taken by a wrong-doer, but that they were ſeized as forfeited for a good cauſe of forfeiture, and that they were thereby loſt to the plaintiff.

Rule to enter a nonſuit diſcharged (*a*).

(*a*) And no motion was afterwards made to arreſt the judgment.

Saturday, Feb. 11th.

WELLS and Another *againſt* PICKMAN.

The court, upon the application of the ſheriff enlarged the time for his making a return to a writ of fi. fa. upon ſuggeſtion of a reaſonable doubt whether the goods ſeized under the writ were not covered by an extent afterwards iſſued at the ſuit of the crown for malt duties, under the 28 *Geo.* 3. *c.* 37. *ſ.* 21. for the purpoſe of inducing the plaintiff to go into the Court of Exchequer and there conteſt the queſtion of right with the crown in a more eligible manner than in this court.

THE plaintiff ſued out execution againſt the defendant upon a judgment recovered in this cauſe, and the ſheriff ſeized the defendant's goods under a writ of fieri facias; after which time an extent iſſued at the ſuit of the Crown for a debt due for certain duties of exciſe on malt. And the ſheriff having been ruled by the plaintiffs to return the writ,

Dauncey on a former day in this term moved to enlarge the time for the ſheriff to make his return, ſuggeſting that his object in ſo doing was to compel the plaintiffs to give the ſheriff an indemnity, or to go into the Court of Exchequer and litigate the queſtion with the Crown, ſo that the ſheriff, who wiſhed to do what was right might not be compelled to take the riſk and expence of the litigation on himſelf. He ſaid the queſtion was of conſiderable difficulty on the conſtruction of the act of the 28 *G.* 3. *c.* 37. *ſ.* 21. on which the ſeizure was made, whether at the time of the ſeizure (*a*) the goods remained "in the cuſtody of the "maker." And he cited, as authorities in ſupport of the preſent application, *Shaw* v. *Tunbridge* (*b*), where the application was made

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(*a*) Vide *Rorke* v. *Dayrell*, *ante*, 4 vol. 402.

(*b*) 2 *Blac.* 1064.

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made by one of the parties, which the Court refuſed, ſaying that they only interpoſed in ſuch caſes to protect and aſſiſt the ſheriff, when he deſired it. *Semple* v. Lord *Newhaven*, *M.* 24 *G.* 3. where the ſheriff having entered the defendant's houſe and taken poſſeſſion of the goods therein under a writ of fieri facias, the goods were claimed under a bill of ſale by a perſon in poſſeſſion of them at the time for Sir *H. Daſhwood*, the mortgagee, who had been in poſſeſſion from the *June* preceding. The ſheriff having alſo entered another houſe of the defendant's and ſeized the goods there, they were claimed in like manner by Mr. *Tatterſal* under an aſſignment by way of mortgage. Both parties refuſed to indemnify the ſheriff: and upon his being ſerved with a rule to return the writ, he applied to the court of King's Bench, and obtained a rule calling on the plaintiff to ſhew cauſe why the rule for returning the writ ſhould not be diſcharged, or why the plaintiff ſhould not be obliged to indemnify him before the writ ſhould be returned. This rule was afterwards enlarged in order to give Sir *H Daſhwood* and *Tatterſal* an opportunity of declaring, if they would undertake to try an iſſue. But by a ſubſequent rule it was ordered that upon the undertaking of the plaintiff to indemnify the ſheriff, the rule for diſcharging the rule to return the writ ſhould be diſcharged, and it was referred to the Maſter to tax the ſheriff's coſts upon the application to be paid by the plaintiff. Afterwards, by another rule, the real parties agreed to try an iſſue; but a compromiſe taking place between them, the ſheriff made his return to the writ of fieri facias. Alſo *Hill* v. *Hooke*, *E.* 26 *Geo.* 3. *B. R.* where *Gibbs* moved to enlarge the time for the ſheriff's making his return to writs of *fieri facias*, until he was indemnified, and cited the above caſes; which the Court accordingly granted for a certain time.

Gibbs, on a former day, ſhewed cauſe againſt the rule in this cauſe, contending that the ſheriff was bound to make a return at his peril; and that though ſuch indulgence had been ſhewn in ſome caſes by conſent of the parties, at the inſtance of the Court, yet the Court had no power to impoſe ſuch terms on a plaintiff as that of obliging him to indemnify the ſheriff againſt his conſent; and ſaying that he was inſtructed in this caſe not to give ſuch conſent.

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Lord Kenyon, Ch. J. then ſaid, That it was not merely for the ſheriff's aſking that the Court would grant him time to make his return to a writ; but there muſt be ſome reaſonable doubt ſuggeſted. But as it appeared to him that that had been ſufficiently done in the preſent caſe, he thought the Court ſhould, for the preſent, give the ſheriff a week's time; to which the other Judges aſſented; and it was ordered accordingly.

At the expiration of that time

Dauncey obtained another rule calling on the plaintiffs to ſhew cauſe why the time ſhould not be further enlarged; ſtating that application had in the mean while been made to the Court of Exchequer on behalf of the ſheriff. That the practice of that Court was, that upon the return of an inquiſition, an eight day rule is given for any perſon claiming the goods ſeized to come in and prefer his claim; in default of which, at the expiration of the time the writ of venditioni exponas iſſues: that time had in this caſe expired; and the plaintiffs had not put in any claim: but in favour of the ſheriff that Court had conſented to enlarge the time for the ſheriff to make his return to the venditioni exponas, which had regularly iſſued; and had given another eight day rule in order to enable the plaintiffs to put in their claim, and conteſt the queſtion of right with the Crown. This method of proceeding, he obſerved, which was now opened to the plaintiffs in the Exchequer was leſs circuitous and expenſive than the preſent; and therefore the Court, by granting this application, will not put the plaintiffs in a worſe ſituation than they would otherwiſe be in if the ſheriff were compelled to make his return.

Gibbs now ſhewed cauſe againſt any further enlargement of the time. That which the plaintiffs require is quite in the ordinary courſe of juſtice, not as a matter of favour, but of right. The ſheriff having taken poſſeſſion of the defendant's goods under a writ of fieri facias iſſued at the ſuit of the plaintiffs, they only claim that he may make a return to that writ as by law he is bound to do. It is no excuſe for the ſheriff's not doing this that there are other claimants of the goods; the law throws the onus upon him of deciding as well as he can in ſuch caſes; and the legal fees which he is entitled to receive for executing proceſs are by the law ſuppoſed to be an equivalent to him for his riſk and trouble. Applications of this ſort are frequently made in caſes of diſputed claims between ſubject and ſubject, and refuſed by the Court, unleſs where the plaintiff conſents. And there is no reaſon for making a diſtinction in favour of the ſheriff when one of the claimants happens to be the Crown. If this application be granted, there is no reaſon why the Court ſhould not in all caſes ſtay the proceedings till one or other of the parties will agree to indemnify the ſheriff.

Lord KENYON, Ch. J. It has been ſaid that if the preſent application be ſucceſsful, we ſhall eſtabliſh a general rule that where there are contending parties the Court will interfere in all caſes whatever in favour of the ſheriff: but I deſire to have it diſtinctly underſtood that we lay down no ſuch general rule; each caſe muſt depend on its own particular circumſtances, and here I think there is ſufficient reaſon to induce us to interfere. Then it was ſaid that the Court ought not to aſſiſt the ſheriff, becauſe the law allows certain fees which are equivalent to his trouble and riſk: but in fixing thoſe fees the Legiſlature did not (I believe) take this riſk into conſideration; for the law does not ſuppoſe that there is any riſk in caſes of this kind, and in general the ſheriff has the means of informing himſelf of the facts by the intervention of a Jury ſo as to avoid all riſk. But this is a caſe in which it may be difficult to decide whether the goods are bound by the extent, or whether they are liable to the plaintiffs' execution; and it appears that the Court of Exchequer have anxiouſly endeavoured to put the caſe into ſuch a ſituation that all the parties intereſted may come in and ſupport their reſpective claims; therefore I think that the ſheriff ought not to be put to the difficulty and hazard of deciding in this caſe, when there is a ſhorter mode pointed out of determining the rights of all the parties: a deciſion here will not decide the rights of the Crown, whereas by the determination in the Court of Exchequer all the parties will be bound. Without therefore laying down any general rule, I think we ought in this caſe to follow up what we have done already by allowing further time to the ſheriff to return the writ.

GROSE, J. It is not neceſſary now to determine that we will in all caſes interfere and allow the ſheriff time: but we have aſſiſted ſheriffs in many caſes of this kind, and ought I think to give aſſiſtance to the ſheriff in this caſe. Here is a queſtion of great

great importance peculiarly proper to be decided in the Exchequer, and that Court has given all the parties concerned an opportunity of inſiſting on their ſeveral rights; and all that the ſheriff requires of us is, that until that queſtion is decided he ſhall not be obliged to return the writ. This application appears to me a very reaſonable one.

The Court then gave the ſheriff further time until the ſecond day of the next term to return the writ.

Rule abſolute.

Monday, Feb. 13th.

RAYNES and another *qui tam againſt* SPICER.

The Same *againſt* SALOMONS.

The plaintiff in a qui tam action on the 7 *Geo.* 2. *c.* 8. withdrew his record, becauſe the broker who negotiated the illegal bargain for ſtock refuſed to give evidence for fear of ſubjecting himſelf to a penalty on the ſame act; this was held a ſufficient reaſon to diſcharge a a rule for judgment as in caſe of a nonſuit for not proceeding to trial; although the witneſs's liability to be ſued would not be removed till after the the three ſucceeding terms.

THESE were actions brought by the aſſignees of a bankrupt in their own names, in order to recover penalties under the 7 *Geo.* 2. *c.* 8. againſt the defendants, who had been concerned with the bankrupt in ſtock-jobbing tranſactions. The actions were commenced in *Eaſter* term 1796; the defendants appeared and pleaded the general iſſue in the ſame term; and notice of trial was given for the ſittings in *Michaelmas* term laſt, and continued to the ſittings after term, when the cauſes, together with another of the ſame ſort, ſtood in the paper for trial. That other cauſe, which was brought by the ſame plaintiffs againſt a different defendant, was called on firſt; and the plaintiffs called the broker as a witneſs, who had negotiated the buſineſs between the bankrupt and all the defendants; but on his refuſing to give teſtimony, becauſe he might ſubject himſelf to the penalties inflicted by the act of *Geo.* 2. upon brokers acting in the manner imputed to him, the plaintiffs were obliged to ſubmit to a nonſuit in that action; and finding that they could not eſtabliſh their caſe in theſe actions without the broker's evidence, they withdrew the records. Whereupon the defendants, in this term, moved for judgment as in caſe of a nonſuit for the plaintiffs not proceeding to trial purſuant to notice. Againſt which

Erſkine now ſhewed cauſe, ſtating the reaſon which had prevented the plaintiffs from proceeding; and ſaying, that if the Court would ſuſpend the judgment till after next *Michaelmas* term, the plaintiffs would then be enabled to proceed to trial, and compel the broker to give evidence as the time would then be elapſed within which a proſecution could be commenced againſt him.

Garrow, *Wood*, *Bayley*, and *Lawes*, in ſupport of the rule, ſaid that this was a novel attempt on the part of the plaintiffs, and calculated to repeal the ſtatute 31 *Eliz.* *c.* 5. which requires theſe actions to be brought within a limited time, and the conſonant practice of the Court in preventing a vexatious uſe being made of them by keeping them ſuſpended for a long time over the heads of the parties. That in order to give the plaintiffs any effect from their reſiſtance to theſe motions, the actions muſt be ſuſpended for a much longer period than was warranted by any example.

Lord Kenyon, Ch. J. We ought not to give extraordinary indulgence or encourage any improper delay in actions of this kind: but in this caſe there has been no improper delay on the part of the plaintiffs, and they only aſk for the ordinary indulgence that is granted in common caſes, namely, that the cauſe aſſigned for not proceeding to trial may be deemed a ſufficient reaſon why there ſhould not be judgment as in caſe of a nonſuit. In fact one of the cauſes was brought to trial, but the plaintiffs failed becauſe their principal witneſs declined giving evidence leſt he ſhould ſubject himſelf to the penalties of the act. And all that is required is that the cauſes may not be tried until this temporary diſability of the witneſs is removed. It ſeems to me that there is abundant reaſon to put off the trial of theſe cauſes until after next *Michaelmas* term. But it is ſufficient for the preſent to ſay that this rule for judgment as in caſe of a nonſuit ought to be diſcharged.

Grose, J. Although the act of parliament on which theſe actions are brought is penal as far as reſpects thoſe who infringe it, it is highly beneficial as far as concerns the public. But even though this be a penal action, in deciding this caſe we muſt be governed by thoſe rules that are applicable to caſes in general. In ordinary caſes a rule for judgment as in caſe of a nonſuit is diſcharged on the plaintiff's aſſigning a good reaſon for not proceeding to trial; and in this caſe there does not appear to have been any improper delay on the part of the plaintiffs.

Lawrence, J. The argument urged in ſupport of this rule tends to ſhew that in penal actions we have no diſcretion (*a*) in

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(*a*) The ſtat. 14 *Geo.* 2. *c.* 17. enacts that where iſſue is joined, and the plaintiff neglects to bring ſuch iſſue on to be tried according to the courſe and practice of the Court, it ſhall be lawful for the Judges of the Court, &c. upon motion to give the like judgment for the defendant as in caſe of nonſuit, "*unleſs the ſaid Judges ſhall upon* "*juſt cauſe and reaſonable terms allow any* "*further time for the trial of ſuch iſſue*," &c.

1797.

RAYNES *againſt* SPICER.

determining on ſuch an application as the preſent: but that proves too much, becauſe the Court has always exerciſed a diſcretion in granting or refuſing theſe rules in penal as well as other actions.

Rule diſcharged.

THE END OF HILARY TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

GILES and others *againſt* EDWARDS.

Friday, May 5th.

Where ſome act is to be done by each party under a ſpecial agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may, in an action for money had and received, recover back any money he has paid under it.

THIS action for money had and received was tried at the laſt *Shrewſbury* aſſizes before Mr. J. *Lawrence*. On the 6th of *June* 1791 the defendant agreed to ſell to the plaintiffs all his cord-wood growing at *Tredgodoer* in *Shropſhire* at 11*s*. 6*d*. *per* cord ready cut; the wood was to be coaled and cleared from off the premiſes by *Michaelmas* 1792, and the money was to be paid on the 1ſt of *March* 1792. It alſo appeared that the cuſtom was for the ſeller to cut off the boughs and trunks and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut ſixty cords, ten of which he corded, and the plaintiffs re-corded half a cord and meaſured the reſt. On the 8th of *March* 1792 the plaintiffs paid the defendant twenty guineas: but the defendant neglecting to cord the reſt of the wood, the plaintiffs brought this action to recover back the twenty guineas, as having been paid on a contract that had failed.

It was objected at the trial that this action could not be maintained, the contract being ſtill open, and that the plaintiffs

1797. Giles and others *againſt* Edwards.

ſhould have brought a ſpecial action on the caſe for non-performance of the contract, on the principle eſtabliſhed in *Weſton* v. *Downes*, *Dougl.* 23; *Power* v. *Wells*, *Cowp.* 818; and *Towers* v. *Barrett*, *ante*, 1 *vol.* 133. That the plaintiffs could not now abandon the contract altogether, as they had acted under it. But the learned Judge was of opinion that, as it was owing to the fault and negligence of the defendant that the contract which was entire was not carried into execution, the plaintiffs were at liberty to conſider the contract at an end and recover back the money that they had paid, the conſideration having failed. That what had been done by the plaintiffs could not be conſidered as an execution of the contract in part, for that all that they had done was merely to meaſure the wood and re-cord a very ſmall part of it. The plaintiffs obtained a verdict; to ſet aſide which, and to enter a nonſuit, a motion was now made by

Wigley on the above ground: but

The Court were clearly of opinion that the directions given at the trial were right.

Lord Kenyon, Ch. J. ſaid, this was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only.

Rule refuſed.

Saturday, May 6th.

JOHN HIRST, Adminiſtrator *de bonis non* of JAMES HIRST, *againſt* SMITH.

In aſſumpſit brought by an adminiſtrator *de bonis non*, the promiſe may be laid to have been made to the firſt adminiſtrator.

THIS was an action upon promiſes. There was one ſet of counts on ſeveral promiſſory notes given by the defendant to *James Hirſt* in 1774, and on the common money counts, in which the promiſes were ſtated to have been made to the inteſtate; and another ſet in which the promiſes were alleged to have been made to *John Hirſt*, the firſt adminiſtrator of *James Hirſt*, and not to the plaintiff the adminiſtrator *de bonis non*.

In conſequence of a plea of the ſtatute of Limitations the firſt ſet of counts was laid out of the queſtion, but a verdict was given for the plaintiff on the remaining counts.

Chambre now moved in arreſt of judgment, becauſe no promiſe was laid to have been made to the plaintiff, but to the former adminiſtrator, between whom and the plaintiff there was no privity. He admitted that a promiſe in fact made to the firſt adminiſtrator would have taken the caſe out of the ſtatute of Limitations ſo as to have ſupported a count ſtating the promiſe to the plaintiff, becauſe the inteſtate's eſtate was then veſted in the firſt adminiſtrator; but he contended that in order to enable the plaintiff to recover, it ſhould appear on the record that the promiſe was either made to the inteſtate or to the plaintiff.

Lord Kenyon, Ch. J. It is admitted that if the promiſes had been laid to have been made to the plaintiff, a promiſe to the former adminiſtrator would have ſupported the declaration: but there is no reaſon why the plaintiff ſhould be obliged to ſtate a fiction on the record; here the declaration ſeems adapted to the truth of the caſe, and I am not aware of any technical rule of law that ſhews the declaration to be bad. The defendant's objection reſts on this broad foundation that there is no privity between the former adminiſtrator and the plaintiff, the adminiſtrator *de bonis non*: but that propoſition certainly is not true in its extent. Suppoſe the former adminiſtrator had entered into an agreement for the ſale of the leaſe of a chattel intereſt belonging to the inteſtate, and had died before the agreement was completed, the adminiſtrator *de bonis non* ſtands in ſuch privity of eſtate that he would be compelled to carry that agreement into execution.

Ashhurst, J. As it is alleged that the promiſe was made to a perſon from whom the plaintiff deduces his title, and between whom and the plaintiff there is a privity of eſtate in law, it is the ſame as if it had been ſtated that the promiſe was made to the plaintiff himſelf, becauſe the law recognizes the relation.

Per Curiam, Rule refuſed.

1797.

Saturday, May 6th.

MADDOCK *qui tam againſt* Sir B. HAMMETT and others.

The offence of uſury is not complete until the lender has actually received the exceſs of intereſt in money or money's worth. Therefore if a promiſſory note be given for repayment of a ſum lent with uſurious intereſt, and the note when due be taken up and another note ſubſtituted for it, the offence of uſury is not thereby committed, nor is the penalty incurred till the latter note be paid.

THIS was an action on the ſtatute (*a*) for uſury, in which the facts were ſtated to be theſe. On the 14th *May* 1795 one *Haviland* carried a promiſſory note, in reſpect of which the uſury was aſſigned, to the defendants, who were bankers at *Taunton*, to be diſcounted. The note was made by *Haviland* for 1000*l.* on the ſaid 14th *May*, payable four months after date to Sir *William Yea* or order, and indorſed by him. The defendants paid *Haviland* 183*l.* 6*s.* 8*d.* in caſh, 300*l.* in bank notes, charged 16*l.* 13*s.* 4*d.* for the diſcount, and paid the remaining 500*l.* by a draft on their bankers in *London* payable ſeven days after ſight. The uſury was ſtated to conſiſt in calculating this laſt-mentioned draft as caſh, inſtead of deducting ſo much from the diſcount as the draft had to run before it became payable. But the point on which the caſe turned was this; the note for 1000*l.* on which the diſcount was taken became payable on the 17th *September*, on which day *Haviland* diſcharged it by giving another note for 2300*l.* which included the ſum due upon the firſt note and alſo a further advance which he received from the defendants; and the ſecond note is ſtill outſtanding and unſatisfied. *Buller*, J. was of opinion at the trial at the laſt *Taunton* aſſizes that the offence charged was not complete; for that in order to conſtitute uſury there muſt be an uſurious taking, either of money or money's worth, as well as an uſurious contract; whereas nothing had been taken by the defendants except *Haviland*'s note, which at preſent only gave them a right of action, and perhaps might never be paid. He therefore nonſuited the plaintiff.

Gibbs now moved to ſet aſide the nonſuit, 1ſt, Becauſe the note for 2300*l.* was taken *in payment* for that of 1000*l.*, on which the uſury is aſſigned, and which was thereupon cancelled. It was ſo underſtood between the parties at the time, and therefore the tranſaction is the ſame as if the firſt note had been paid in caſh, and then the whole ſum had been advanced by the defendants on the ſecond note. 2dly, The exceſs of intereſt was received by the defendants at the time of diſcounting the firſt bill; and whether

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(*a*) 12 *An.* *ſt.* 2. *c.* 16.

the money be retained by the lender or paid by the borrower is the ſame thing: the formality of it's actually paſſing from one hand to another cannot vary the caſe. *Lloyd q. t.* v. *Williams* (*a*) is in point to ſhew that the uſury is complete at the time of taking the uſurious intereſt, although the principal may never be paid.

Lord KENYON, Ch. J. The objection here is, that nothing has been received by the defendants either for intereſt or principal, except a paper ſecurity, which till it has been paid is no payment whatever, and may ultimately turn out to be worth nothing. The plaintiff ſays that it was given for the firſt note, which was given on an uſurious contract: if ſo, the ſecond note is alſo bad. But the plaintiff cannot be permitted to contend both ways; that it is good, becauſe given in payment of the firſt note, and bad becauſe that firſt note for which it was given in diſcharge was bad. It is true that a payment either in money or money's worth would be ſufficient: and it ſhall not be permitted to a party who has knowingly received any thing, *as intereſt*, to apply it afterwards to another account as he finds it convenient. But here the defendants have not received any thing; and therefore I am of opinion that the direction of the learned judge at the trial was right. If indeed the note in this caſe had been paid, it would have fallen within the principle of the *Portſmouth* Bankers' caſe (*b*), which I held to be uſury. That opinion has I know been queſtioned by mercantile men; but after all the conſideration which I have been able to give to that caſe, I ſtill think that it was rightly decided.

Per Curiam, Rule refuſed.

(*a*) 3 *Wilſ.* 250. (*b*) *Matthews* q. t. v. *Griffiths* and others, *Peake's Ni. Pri. Caſ.* 200.

GOODTITLE on the Demiſe of TAYSUM *againſt* POPE.

Saturday, May 6th.

The Court will not ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor on the latter paying principal intereſt and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee.

A RULE had been obtained, calling on the plaintiff to ſhew cauſe why the proceedings in this ejectment, which was brought by the mortgagee againſt the mortgagor, ſhould not be ſtayed on payment of principal intereſt and coſts.

Abbot, who now ſhewed cauſe againſt the rule, produced an affidavit, in which it was ſtated that in 1792 the defendant by an

1797.

GOODTITLE dem. TAYSUM *againſt* POPE.

agreement under ſeal in conſideration of a certain ſum agreed to convey the premiſes to the mortgagee abſolutely, and that a ſum of money due from the mortgagor to the mortgagee ſhould be deducted out of the purchaſe money ſo to be paid; and that ſeveral applications had been ſince made to the mortgagor to complete the purchaſe, which he had refuſed.—He then contended that under the proviſo in the ſtat. 7 *Geo.* 2. *c.* 20. *ſ.* 3. (*a*) the mortgagor had no right to the benefit of the ſtatute.

Lane, in ſupport of the rule, admitted the agreement made in 1792, but contended that ſuch an agreement to convey was not within the proviſo of the act.

Lord KENYON, Ch. J. The mortgagor has now no right to redeem; a Court of Equity would decree him to complete the agreement made in 1792. This is an application againſt the juſtice of the caſe; and if we were to liſten to it, and ſtrip the mortgagee of his legal title, it might let in a poſterior equitable right to the prejudice of the mortgagee, though he ſhould hereafter obtain a decree for the performance of his agreement in 1792.

Rule diſcharged (*b*).

(*a*) Which enacts that the act ſhall not extend to any caſe where the perſon againſt whom the redemption is prayed ſhall inſiſt either that the party praying a redemption has not a right to redeem, or that the premiſes are chargeable with other ſums &c; nor to any caſe where the right of redemption in any cauſe or ſuit ſhall be controverted or queſtioned by or between different defendants in the ſame cauſe or ſuit &c.

(*b*) But ſee *Skinner* v. *Stacy*, 1 *Wilſ.* 80.

Monday,
May 8th.

FARMER *againſt* LEGG.

By 31 *Geo.* 3. *c.* 54. *ſ.* 7. for regulating the *African* ſlave trade it is neceſſary that the certificate of the captain's having ſerved as that act requires ſhould be atteſted by the owner or owners of the ſhip or ſhips in which the ſervice was performed.

THIS was an action on a policy of inſurance on "the *Cadiz* Diſpatch," an *African* ſhip engaged in the ſlave trade, "at and from *London* to the coaſt of *Africa*, during her ſtay there, and from thence to her port of diſcharge in the *Weſt Indies*." The loſs happened in conſequence of an inſurrection of the ſlaves. The principal queſtion was whether the ſhip had been navigated in the manner preſcribed by the 31 *Geo.* 3. *c.* 54. (*a*) the 7th ſect. of which enacts "that it ſhall not be lawful for any perſon to become a maſter, or take or have the command or charge of any

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(*a*) This was one of the ſtatutes paſſed on this ſubject; it has been ſince continued down by ſeveral acts from time to time; and the reference is made to it as being ſet out at large in *Runnington*'s edition of the Statutes: but the act cited in Court was the 32 *Geo.* 3. *c.* 52.

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ſuch ſhip or veſſel at the time he ſhall clear out from any port of *Great Britain* for purchaſing and carrying ſlaves from the coaſt of *Africa*, unleſs ſuch maſter or perſon taking or having the charge or command of any ſuch ſhip or veſſel ſhall have made oath, and delivered in to the collector or other chief officer of the cuſtoms, at the port where ſuch ſhip or veſſel ſhall clear out, *a certificate atteſted by the reſpective owner or owners* that he has already ſerved in ſuch capacity during one voyage, or ſhall have ſerved as chief mate or ſurgeon during the whole of two voyages, or either as chief or other mate during three voyages, in purchaſing and carrying ſlaves from the coaſt of *Africa*; under pain that ſuch maſter or other perſon taking or having the charge or command of any ſuch ſhip or veſſel, and alſo the owner or owners who ſhall hire or employ ſuch perſon, ſhall for every ſuch offence reſpectively forfeit and pay the ſum of 500 *l*." The queſtion was, whether the certificate therein required ought to be atteſted by the owner of the ſhip upon the voyage inſured, or by the owner or owners of the ſhips during the reſpective voyages out of which the qualification aroſe? In the preſent inſtance the captain had made oath that he had been two voyages as chief mate in the ſhip *Sally* engaged in the ſlave trade, and the preſent plaintiff (the owner in the voyage inſured) had certified that that was true to the beſt of his knowledge and belief. And Lord *Kenyon*, being of opinion at the trial that ſuch certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff. In the laſt term a rule *niſi* was granted for ſetting aſide the nonſuit on the ground of a miſconſtruction of the act of parliament; againſt which

Erſkine, *Law*, and *Giles*, now ſhewed cauſe. Though the clauſe is obſcurely worded, yet if the intention of the Legiſlature be adverted to, it will furniſh a clue to the proper conſtruction of it. The intention was to compel the owners of veſſels employed in this traffic to ſelect judicious and ſkilful commanders, perſons of approved character, as the moſt effectual method of ſecuring to the ſlaves proper care and attention during their paſſage to the *Weſt Indies*. For which purpoſe the oath of the captain is in the firſt inſtance required to the fact of his having before ſerved in one or other of the capacities mentioned in a former voyage or voyages. But as he was intereſted in giving himſelf this qualification, the Legiſlature required a further ſanction, namely, the atteſtation of *the reſpective owner or owners;* which does not mean a mere atteſtation that ſuch an oath was taken, but that the

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party atteſting bears witneſs of the facts ſworn to. Now if that be conſtrued to mean the owner of the intended voyage, ſuch a ſanction carries the ſecurity no further than, nor indeed ſo far as, the captain's oath; becauſe ſuch owner muſt take the facts upon the captain's repreſentation; and he is as much intereſted in atteſting as the captain is in making the oath, ſince he himſelf is liable to a penalty of 500 *l.* as well as the captain for the want of a proper certificate; but no penalty attaches upon a falſe atteſtation. Neither can it be ſuppoſed that the Legiſlature, for the purpoſe which has been ſtated, ſhould require the atteſtation of a fact from a perſon who muſt be ignorant of it rather than from one to whom it muſt be known. The reaſon of the thing ſhews that they muſt have intended that the certificate ſhould be atteſted by the former owner, becauſe it was intended to be like a certificate of character from the captain's laſt place, which the Legiſlature might reaſonably ſuppoſe would not be given or withheld without juſt cauſe. But ſuch a ſanction from a preſent owner would be ſuperfluous; becauſe the very act of appointing a captain to the command of a ſhip implies the good opinion of the owner ſo appointing. This conſtruction is alſo ſupported by the words of the clauſe; for in any other ſenſe the word "*reſpective*" (*viz.* "reſpective owner or owners") would be abſurd and inapplicable. It is a diſtributive word, and cannot be applied to the antecedent "ſhip or veſſel" in the ſingular number; it muſt mean therefore the "reſpective owner or owners" *during the former voyages which the captain is required to have performed in order to give him a qualification* (a); during one ſuch voyage as a captain, or two voyages as chief mate or ſurgeon, or three voyages as chief or any other mate. In this ſenſe the word *reſpective* was neceſſary and important, and could not with propriety have been omitted: but in the ſenſe contended for by the plaintiff the Legiſlature, inſtead of ſaying "*reſpective* owner" &c, would have ſaid the owner &c *thereof*, referring to the owner of the veſſel clearing out. And this is ſtill more evident from the wording of the latter part of the clauſe, which attaches the forfeiture on *ſuch* maſter and *alſo* on *the owner or owners who ſhall hire him*, not being ſo qualified. If the ſame owner or owners were there intended as in the former part of the clauſe, the word *ſuch* would

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(a) It is obſervable that in a former ſtat. 29 *Geo.* 3. *c.* 66. *ſ.* 8. this is required in expreſs terms, "a certificate atteſted by the reſpective owner or owners, ſurgeon, chief or other mate of the veſſel or veſſels *in which he ſhall have made ſuch voyage or voyages,*" &c.

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have been applied to them as well as to the maſter, to which latter only it is applied. The omiſſion marks the diſtinction ſtrongly. And the additional words "who ſhall hire him" would be nugatory unleſs applied to a different deſcription of owners from thoſe before ſtated: whereas all the words in the clauſe are neceſſary to the defendant's conſtruction. An inconvenience may be ſuggeſted againſt this, that in caſe of the death of the former owner, or his unjuſt refuſal to certify, the captain will be without remedy. But the Legiſlature did not ſuppoſe that the certificate would be unjuſtly withheld; and at leaſt it was leſs likely to be ſo by the former owner whoſe intereſt had ceaſed, than to be improvidently granted by the preſent owner who has a direct intereſt in granting it. And as to the caſe of death, it will be the captain's own fault if he does not procure a certificate from his owner as ſoon as he returns from the voyage; and even in caſe of the owner's death during the voyage, there muſt be ſome other perſon to ſucceed to the property who will be able to give a certificate at the time of the captain's return. Perhaps alſo, if it were ſhewn to be impoſſible for the captain to have obtained a certificate, without any default on his part, that would be an anſwer to an action for the penalty, upon the maxim *lex non cogit ad impoſſibilia*.

Garrow, *Gibbs*, and *Lens*, *contrà*. The conſtruction contended for by the defendant will work manifeſt injuſtice and inconvenience; and though the words might warrant ſuch a conſtruction, yet if they will alſo warrant another which is more favourable to juſtice and convenience, the Court will of courſe adopt the latter. Now if the certificate is to be atteſted by the former owner it might happen that without any default of the captain he may not be able to obtain it, and thereby be deprived of the means of purſuing his occupation. The former owner may die before a certificate can be conveniently obtained from him after the concluſion of the voyage, or he may be abroad and unable to give one. Theſe inconveniences cannot happen according to the other conſtruction; for a captain would not of courſe engage with any owner who could not atteſt the oath. Again, there is no power given by the act to compel the former owner to grant a certificate, however unjuſtly withheld; and the act being voluntary, no remedy lies for the non-performance of it. As to the meaning of the ſtatute; the general purpoſe of the Legiſlature may be attained as well by the one conſtruction as the other. The principal object was to have the captain's oath;

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oath; the atteſtation of either deſcription of owners is merely ſecondary. There is no particular form of certificate required by the act; and therefore perhaps an atteſtation by either may be deemed ſufficient, the Legiſlature not having ſpecified in terms by which it is to be done. The uſage ſince the paſſing of the act has been different in different ports, at *London* and *Liverpool* ſometimes by the one owner ſometimes by the other, at *Briſtol* by the former owner only (*a*). The certificate required is not a certificate of character as ſuppoſed, but of the mere fact of the captain's having before ſerved in one or other of the capacities mentioned; which may be known as well to the one deſcription of owner as to the other. Beſides, the grammatical conſtruction of the words of the clauſe is in favour of the plaintiff; for the words "*reſpective* owner or owners" can only refer to the antecedent, namely, of *ſuch ſhip or veſſel as ſhall clear out*. There is nothing elſe in the preceding part of the clauſe to which they can refer: and then "*reſpective*" will relate to the reſpective owners of the ſeveral ſhips engaged in the *African* trade, to which the regulations of the act refer. If any other owners had been intended, it would have been ſaid reſpective owners *on any former voyages*, or words to that effect. But it would be too much to inſert thoſe words by conſtruction in a clauſe which inflicts a penalty of 500*l*. Beſides, the act requires *a certificate* to be granted; which requiſition may eaſily be complied with according to the plaintiff's conſtruction, becauſe in all inſtances it may be given by the preſent owner: but it would be impoſſible to do ſo in ſome caſes according to the defendant's conſtruction, as where the qualification ariſes from having performed two or three former voyages; in which caſe it would be neceſſary to have a certificate from each of the owners during the ſeveral voyages, and therefore one certificate, which is all that the act requires, would not then anſwer the purpoſe of the ſtatute.

Lord Kenyon, Ch. J. It is not peculiar to this act of parliament that it has not provided for every caſe that might poſſibly occur. Notwithſtanding all the care and anxiety of the perſons who frame acts of parliament to guard againſt every event, it frequently turns out that certain caſes were not foreſeen. Such ſeems to be the caſe in the preſent act with reſpect to ſome of the inſtances

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(*a*) In the laſt term the Court directed an inquiry into the practice among merchants, and this was now ſtated at the bar to be the reſult of that inquiry.

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inſtances put at the bar, of the owners of the former ſhips dying without giving a certificate to the captain, or refuſing to certify. But the queſtion here ariſes on the meaning of the act as applied to this particular caſe. The merchants in the different trading towns in this kingdom have put different conſtructions on this act; it now appears that thoſe at *London* and *Liverpool* have been divided on the ſubject, while thoſe at *Briſtol* have thought it neceſſary that the captain ſhould have a certificate from the owners of the ſhips in which the qualification was obtained. But it now becomes our duty, for the firſt time, to put a legal conſtruction on this act of parliament. The act was paſſed for the moſt humane purpoſes, the object of the Legiſlature being to meliorate the condition of the ſlaves during the voyage; then let us conſider on the broad view of the act which of the two conſtructions will moſt probably attain that end. If the Legiſlature had thought that the oath of the captain alone would have been ſufficient, they would have required nothing more: but they have ſuperadded a certificate to ſuch oath. Now a certificate *ex vi termini* imports that the party certifying knows the facts that he certifies. This is like a character of a ſervant: if you wiſh to have any information beſides the teſtimony of the ſervant himſelf, to whom would you apply? To the new maſter who is ignorant upon the ſubject, or to the maſter whom he laſt ſerved? The latter knows the fact which he certifies, but the former cannot. So here the owners of the ſhips in which the captain formerly ſerved might have certified from their own knowledge, but the owners of the ſhip in queſtion could not. I confeſs indeed that the caſe is not without doubt; but after the beſt conſideration that I have been able to give, I am of opinion that the certificate which was obtained in this caſe was not ſufficient, becauſe the Legiſlature meant that there ſhould be the beſt aſſurance of the captain's qualification that could reaſonably be expected, and the certificate by the new owners, who do not of themſelves know the capacity of the captain, adds no weight to the teſtimony of the captain himſelf. The argument drawn by the defendant's counſel from the word "*reſpective*" has not in my opinion been ſatisfactorily anſwered.

ASHHURST, J. In a caſe where the words of an act of parliament are doubtful, we muſt ſee what were the miſchiefs againſt which the Legiſlature meant to guard, and endeavour to find out the moſt probable means of effecting that purpoſe. It was undoubtedly the intention of the Legiſlature to put a check to the

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miſchievous and improvident manner of carrying the ſlaves to the *Weſt Indies:* it was intended that the ſlaves ſhould have as much indulgence as their ſituation would permit, and for that purpoſe it was, amongſt other things, enacted that the captain of every ſlave ſhip ſhould have a certain qualification gained by his experience in the trade, of which the captain is to make oath, and which oath is to be corroborated by the certificate of the owners. Now who can certify but thoſe who are ſuppoſed to be cognizant of the fact to be certified? and who are thoſe but the owners of the ſhips in which the captain has performed the ſervices out of which the qualification ariſes? It is therefore a more rational conſtruction of this act of parliament that the owners of the reſpective ſhips in which the captain has gained this qualification ſhould certify that he has ſo ſerved than that the owners of the ſhip in which he is about to be engaged ſhould certify a fact, the truth of which they cannot know. With regard to the ſuppoſed refuſal of the former owners to certify; moſt probably they will in all caſes certify unleſs there be ſome real objection to the captain; and if there be ſuch an objection, he has no reaſon to complain.

Grose, J. In conſidering this queſtion great doubts have occurred in my mind. We muſt decide according to the intention of the Legiſlature which is to be collected from the general object of the act and from the particular words uſed in it. The object of it was the benefit and melioration of the ſituation of the ſlaves as well as the benefit of the owners of the ſlave ſhips. There are different regulations in the act as applied to the ſlaves the maſter and the owners. For the benefit of the ſlaves and the owners it requires that the captain ſhall be a perſon of experience in the trade; that he ſhall have either ſerved one voyage as captain, two voyages as ſurgeon, or three as chief mate; and the act ſays that the voyage ſhall not be undertaken unleſs the captain ſhall make oath of that fact, and unleſs a certificate be obtained atteſted by the reſpective owner or owners. In ſtrict grammatical conſtruction this certificate muſt be given by the owner of the *then ſhip*, for that is the only ſhip that had been before mentioned in that clauſe: but it is abſurd to require the certificate of a perſon who cannot know the truth of any part of that which he certifies. But in order to make the clauſe intelligible, I tranſpoſe the words thus "unleſs ſuch maſter &c ſhall have made oath that he has already ſerved in ſuch capacity

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during one voyage, or ſhall have ſerved as chief mate or ſurgeon during the whole of two voyages, or either as chief or other mate during three voyages, and delivered in to the collector a certificate atteſted by the *reſpective* owner or owners"; then the whole is conſiſtent with the argument uſed on behalf of the defendant, and the word "reſpective" may be applied to the owners of the different ſhips in which the captain has ſerved. This is the conſtruction which I conceive will beſt effect the purpoſes of the Legiſlature, and will be moſt conducive to the benefit of the owners and the ſlaves. And this is ſtrengthened by conſidering that, if the Legiſlature had intended that the owner of the ſhip in which the captain was about to be employed ſhould certify, they would not have inſerted the word "reſpective." On the whole therefore, though this caſe is not free from doubt, I think that this is the true conſtruction of this act of parliament.

LAWRENCE, J. My opinion has fluctuated during the courſe of this argument. The clauſe on which the queſtion ariſes is very inaccurately drawn. The argument as to the hardſhip of the caſe had great weight with me; the act is to receive the ſame conſtruction now as if the queſtion had ariſen ſoon after the paſſing of the act, and no prudence on the part of the maſter could have guarded againſt the inconvenience that has been pointed out, of the owner of the ſhip dying before the certificate could be obtained: but however we might wiſh to provide for every hardſhip that may occur, we are bound to put that conſtruction on the act that the Legiſlature intended. And on the whole I am of opinion that the conſtruction that the Court has put on this act is the true one. No ſatisfactory anſwer has been given to the defendant's obſervation on the word "reſpective." For though this is a general regulation of the ſlave ſhips, the word "ſhips" in the plural number is not uſed in the prior part of this clauſe; if it had occurred, the word "reſpective" might have been referred to thoſe ſhips: but the word "ſhip" is there inſerted, and to that "reſpective" is inapplicable; but if the word "reſpective" be applied to the owners of the different ſhips in which the captain has before ſerved, then it has an appropriate meaning. Some reliance however was made by the plaintiff's counſel on the words "a certificate" in the ſingular number: but that muſt be taken with reference to every part of the ſection; for all the three atteſtations together may form but one certificate of the captain's having ſerved three voyages, in the caſe where thoſe three atteſtations are

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neceſſary. Then with regard to the penalty: if the plaintiff's conſtruction were to prevail the penalty could never be recovered, for the owner who was about to employ the captain would of courſe give him a certificate in order to protect himſelf from the penalty of the act, and ſuch a certificate would be no additional teſt of the captain's qualification; whereas the owners of the ſhips in which the captain has ſerved are not intereſted in giving a falſe certificate, and they have an opportunity of knowing the truth of the facts contained in the certificate. Therefore I am of opinion that the nonſuit ought not to be ſet aſide.

Rule diſcharged (*a*).

Gibbs, afterwards ſuggeſting that this was a caſe of conſiderable importance, deſired that the plaintiff might have an opportunity of putting this queſtion on the record, and it was agreed that a ſpecial verdict ſhould be drawn up in order that a writ of error might be brought.

(*a*) *Vid. Law* v. *Hollingsworth*, *ſup.* 160.

Monday, May 8th.

HALSEY *againſt* HALES, Bart. and another.

A., who was tenant for life, with remainder to truſtees &c, remainder to his firſt and other ſons in tail, remainder to himſelf in fee, ſuffered together with *B.* his only ſon a recovery, and declared the uſes to ſuch perſon and for ſuch eſtate &c as they ſhould jointly appoint; they jointly granted an annuity and appointed and granted the lands to *C.* for a term of years in truſt for the grantee—Held that this caſe came within the exception of the annuity act.

A RULE was obtained in the laſt term, calling on the plaintiff to ſhew cauſe why the judgment which had been entered up ſhould not be ſet aſide, and the ſecurities given to ſecure an annuity delivered up to be cancelled.

The facts of the caſe were theſe; Sir *E. Hales* prior to the year 1781 was tenant for ninety-nine years, if he ſhould ſo long live, of an undivided moiety of certain eſtates in *Kent*, remainder to truſtees to ſupport contingent remainders, remainder to his firſt and other ſons in tail, remainder to himſelf in fee; and as to the other undivided moiety he was tenant for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to himſelf in fee. In 1781 Sir *E. Hales* and *E. Hales* his only ſon (the other defendant) ſuffered a recovery of the firſt moiety, and in 1783 they ſuffered a recovery of the ſecond; the uſes of the former were declared to be the ſame as thoſe to which that moiety was before ſubject; the uſes of the ſecond were to ſuch perſon and perſons and for ſuch eſtate &c and upon ſuch truſt &c as Sir *E. Hales* and his ſon ſhould by any deed &c jointly appoint, and in default of ſuch appointment to ſuch uſes, upon ſuch truſts, and for ſuch purpoſes, as the ſame moiety was ſubject to before the recovery. In 1787 Sir *E. Hales* and

and his ſon in conſideration of 3200*l.* granted to the plaintiff an annuity of 400*l.* during the joint lives of the grantors and the life of the ſurvivor; and by way of ſecurity gave him a bond for 6400*l.* and a warrant of attorney to confeſs judgment on the bond; and they executed an indenture in which they limited, appointed, granted, and demiſed, both the moieties of the above eſtates to *J. Harcourt* for ninety-nine years in truſt for the plaintiff. A memorial of theſe deeds was enrolled within the time limited, but the preſent rule was obtained on a ſuggeſtion of ſome defects in the memorial.

The caſe was in part heard in the laſt term, but it then ſtood over in the hopes of a compromiſe between the parties; that failing, the caſe was now argued by *Erſkine*, *Gibbs*, and *Wigley*, againſt the rule, and by *Law*, *Garrow*, and *Onſlow* in ſupport of it. It was admitted that the recovery which was ſuffered of the firſt moiety was invalid, for want of a good tenant to the præcipe; and therefore the plaintiff relinquiſhed his claim on that moiety: but the other moiety was of the annual value of 1200*l.*

Againſt the rule it was contended that this caſe came within the words of the exception in the annuity act (*a*); for that under the recovery ſuffered in 1783, the defendants had the power of appointing the fee to ſuch perſon and for ſuch eſtate as they choſe, and that they had exerciſed this power in favor of the plaintiff. But at all events they inſiſted that this caſe came within the ſpirit of that exception, as the two defendants had the whole eſtate in them, the father being tenant for life, remainder to his ſon in tail, with a remainder to himſelf in fee.

On the other hand it was ſaid that this caſe did not fall within the exception, becauſe neither Sir *E. Hales* nor his ſon was ſeiſed in fee-ſimple or fee-tail *in poſſeſſion*, the one being only tenant for life in poſſeſſion with an ultimate reverſion in fee, expectant on the determination of an eſtate-tail, and the other tenant in tail in remainder. The counſel obſerved that in *Shrapnel* v. *Vernon* (*b*) Lord *Thurlow* C. decided that an annuity granted by a mortgagor was excepted out of the annuity act, becauſe, according to the words of that exception, he was ſeiſed, though ſeiſed only of an equitable eſtate, from which they argued that it

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(*a*) Which enacts (inter alia) that nothing in the act contained ſhall extend "to any annuity or rent charge ſecured upon lands of equal or greater annual value, whereof the grantor was ſeiſed in fee-ſimple or fee-tail in poſſeſſion at the time of the grant &c."

(*b*) 2 *Bro. Ch. Caſ.* 268.

it ought to be decided that this caſe did not come within the exception, becauſe the words of the exception did not extend to it. And the grantee himſelf thought this was not an excepted caſe, becauſe he enrolled a memorial (though a defective one) of the deeds.

Lord KENYON, Ch. J. When a perſon affects to grant the whole of an eſtate and his power extends only to part, the grant may operate on that part over which he had power: here it appears that the grantors had no authority to charge one of the undivided moieties, but the grantee of the annuity is ſatisfied with the other. We are called upon in this caſe to decide according to the ſtrict letter of the act of parliament: but that is not the true line of conſtruction, for Lord *Coke* ſays *qui hæret in literâ hæret in cortice.* We muſt therefore conſider what is the fair meaning of the act; I think the object of the Legiſlature was to prevent perſons, who had no marketable eſtates, making improvident bargains in granting annuities: but they thought that a perſon who could bring a real ſecurity to market was not ſubject to ſuch impoſitions, and therefore they provided by the laſt clauſe that the act ſhould not extend to any annuity ſecured by lands of equal or greater annual value whereof the grantor was ſeiſed in fee-ſimple or fee-tail. Now what eſtate had the grantors of this annuity? They had the power over the fee-ſimple; and it ſeems as if Lord *Thurlow* thought in the caſe cited that ſuch a caſe came within the exception of the act. The grantors had the controul over the eſtate; they went to market with a good title, and were not in the ſituation of perſons who are induced from the imbecility of their title to grant an annuity to a diſadvantage, and the conveyance which they executed was competent to charge the real eſtate. I therefore think that this caſe comes within the fair meaning of the exception in the act of parliament, and that this determination will not let in any of the inconveniences againſt which the Legiſlature intended to guard.

Per Curiam Rule diſcharged.

The KING *againſt* The Inhabitants of FRITWELL.

Wedneſday, May 10th.

The pauper rented two farms of the yearly value of 10 *l.* in the pariſh of *A.* and lived for 40 days with his family rent free in one of two ſeparate tenements in *B.* of the yearly value of 35 *s.* by the permiſſion of a relation, who occupied the other tenement, received no rent from the pauper, but had all the dung and manure made by his cattle there: ruled that the pauper gained a ſettlement in *B.*

ROBERT *HEARNE*, a ſon of *Thomas Hearne*, and his family were removed by an order of two juſtices from *Stoke Lyne* to *Fritwell.* The Seſſions on appeal confirmed the order, ſubject to the opinion of this Court on the following caſe.

Thomas Hearne the pauper's father about twenty-two years ſince rented two farms of *A. B.* in the pariſh of *Stone Lyne*, the one of the yearly value of 35 *l.* and the other of the yearly value of 10 *l.* During the laſt four months that he occupied the above farms he together with his family dwelt in the adjoining pariſh of *Fritwell* in part of a houſe belonging to a near relation who permitted him to live in it rent free: the houſe conſiſted of two ſeparate tenements, one of which the pauper and his family occupied together with a barn ſtable and yard appurtenant. He kept a team there and drew his corn from his farm at *Stoke Lyne* to *Fritwell.* In this ſeparate tenement he continued nearly two years from his firſt entering into it, but he never occupied any lands in the pariſh of *Fritwell.* The ſeparate tenement and uſe of the barn ſtable and yard were of the yearly value of 35 *s.* or thereabouts. He never paid any rent to his relation in reſpect of them, but the relation had all the dung and manure made by the pauper's cattle, and ſpread it upon his own lands in an adjoining pariſh.

Erſkine and *Lockhart* were to have argued in ſupport of the order of Seſſions; but the Court deſired to hear the other ſide.

Perceval and *Mackaneſs*, againſt the order of Seſſions, contended on the authority of *Rex* v. *Topcropt* (*a*) and *R.* v. *Knighton* (*b*) that in order to gain a ſettlement by renting a tenement of 10 *l.* a year, it muſt appear that the party had *a right* to reſide for forty days in the pariſh where ſome part of the premiſes lies. In the firſt of thoſe caſes the party reſided in another pariſh in his ſon-in-law's houſe, to which he had removed his own furniture; and in the ſecond in his father-in-law's houſe, where his family and a ſervant lived with him: but neither of thoſe reſidences was holden ſufficient to confer a ſettlement in the pariſh where the reſidence was. In like manner this was only a permiſſive occupation in this caſe, not as tenant, but merely out of

(*a*) 2 *Conſt's Bott* 210.

(*b*) *Ante*, 2 *vol.* 48.

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The KING *againſt* The Inhabitants of FRITWELL.

regard as a relation. The circumſtance of the houſe being divided into two tenements cannot vary the nature of the occupation. In *R.* v. *Catherington* (*a*), where the mortgagee in poſſeſſion afterwards gave the mortgagor leave to inhabit his houſe upon his requeſt, for the purpoſe of over-looking ſome repairs, it was holden not to be an occupation in his own right. In all theſe caſes, as was ſaid by Lord *Kenyon* in *R.* v. *South Lyne* (*b*), the party muſt occupy in the relation of tenant to the premiſes. And though the Courts have been of late years ſtudious to convert that which was formerly conſidered as a tenancy at will into a tenancy from year to year, yet there has been always ſome circumſtance indicative of a more permanent tenure than is to be found in this caſe whereon ſuch a conſtruction has been grounded. As in the caſe of *R.* v. *Fillongley* (*c*), where the pauper was permitted by his brother to occupy a tenement and ſome land belonging to him, which land was tilled and ſown by the pauper; there the very nature of ſuch an occupation precluded the idea that the pauper could be turned out of poſſeſſion and deprived of his emblements without a proper notice to quit. This forms a material diſtinction between the two caſes. Here no contract can be preſumed from the nature of the occupation; and the holding might have been determined at any time without any injuſtice to the pauper.

Lord KENYON, Ch. J. It is now too late to inquire into the propriety of all the deciſions that have been made on the ſettlement laws ſince the paſſing of the ſtatute of the 13 & 14 *Car.* 2. For even though it ſhould appear on ſuch inquiry (which I do not ſuggeſt is the caſe) that the words of that ſtatute have been in ſome inſtances ſtrained, yet as there is a ſeries of decided caſes on the ſubject we ought not now to depart from them. If, when the queſtion firſt aroſe, it had been holden that the party muſt have one ſingle tenement in the pariſh of the annual value of 10*l.*, perhaps ſuch a conſtruction of the act would have fallen in with the general opinion of mankind. However it was long ago decided that it need not be one undivided tenement held under one landlord nor all lying in one pariſh, for that diſtinct tenements held under different landlords and lying in ſeveral pariſhes may be joined together, and provided they all together amount to the annual value of 10*l.* they will confer

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(*a*) *Ante*, 3 *vol.* 771.

(*b*) *Ante*, 5 *vol.* 667.

(*c*) *Ante*, 1 *vol.* 458.

confer a ſettlement on the party. And that being once decided, I think it puts an end to this queſtion. Here the pauper's father, who rented two tenements in *Stone Lyne*, went to the pariſh of *Fritwell* where he entered into part of a houſe, forming a diſtinct tenement by itſelf, and belonging to his relation, where he was permitted to live, but not as has been argued out of charity. This is not like one of the caſes cited where the pauper was taken into the houſe of his ſon-in-law as a lodger; for here were two ſeparate tenements, the whole of one of which he occupied; and I am not prepared to ſay that his relation could have turned him out of poſſeſſion on a day's notice. And though it is ſtated in the caſe that the pauper paid no rent in money, it appears that there was an equivalent; there was a *quid pro quo;* the pauper brought all his dung and manure from his other tenements, and this relation had the benefit of it. As therefore he was in the occupation of more than 10*l.* a year in the whole, and ſome part of it lay in the pariſh of *Fritwell*, I am of opinion that this caſe was properly decided as well by the juſtices who removed the pauper as by thoſe who confirmed the order on hearing the appeal.

Ashhurst, J. The only queſtion here is, what kind of occupation this was by the pauper's father? It ſeems that it may be fairly collected from the facts ſtated that the parties were in the ſituation of landlord and tenant. The former, having one tenement more than he wanted for himſelf, let the other have it, who inſtead of paying his rent in money gave his relation the manure that he brought from a farm in an adjoining pariſh.

Grose, J. of the ſame opinion.

Lawrence, J. It is ſtated in the caſe that no rent was paid for the tenement in *Fritwell*, from which I underſtand merely that *no money* was paid for rent; for the manure ſeems to have been given as a compenſation for the uſe of the tenement. And I ſhould have no doubt but that a landlord might recover on a quantum meruit on ſuch an occupation as the preſent.

Both orders confirmed.

Wedneſday, May 10th.

The KING *againſt* The Juſtices of FLINTSHIRE.

An appeal againſt an order of removal may be entered at the next Seſſions but one after the order is executed, if there be not a reaſonable time between the execution of the order and the next Seſſions to make inquiries reſpecting the pauper's ſettlement.

THIS was a rule calling on the defendants to ſhew cauſe why a mandamus ſhould not iſſue, commanding them to receive an appeal againſt an order of two juſtices, by which *T. Kirkham* and his wife and family were removed from *Mold* in the county of *Flint* to *Leek* in *Staffordſhire*.

The order was dated on the 24th of *September* laſt, and executed on *Monday* the 3d of *October* at four o'clock in the afternoon at *Leek* which is at the diſtance of fifty-four miles from *Mold*, where the *Flintſhire* Seſſions were holden on *Thurſday* the 6th of *October*. No appeal having been entered at thoſe Seſſions, the juſtices at the *January* Seſſions refuſed to receive the appeal, though it was ſtated to them, and now verified by affidavit, that the overſeer of *Mold* who conveyed the paupers to *Leek* could only ſpeak the *Welſh* language, and that the overſeer at *Leek* who received them could not underſtand him; that near a week elapſed before the pariſh of *Leek* could gain any information reſpecting the ſettlement of the paupers, and conſequently that they were not in a ſituation to appeal at the *Michaelmas* Seſſions. On theſe facts *Gally* obtained a rule for this *mandamus* in the laſt term.

Leyceſter, who now ſhewed cauſe againſt it, produced an affidavit in anſwer; in which it was ſtated that the overſeer of *Mold* when he conveyed the paupers to *Leek* took one *Price* with him for the purpoſe of explaining the circumſtances of the caſe, and who on parting ſaid "he muſt make the beſt of his way home to attend the Seſſions at *Mold;*" it was alſo ſtated that the order of removal was not executed before the 3d of *October* on account of the reſiſtance and threats of the pauper. Under theſe circumſtances he contended that the pariſh of *Leek* ought to have entered their appeal at the *Michaelmas* Seſſions, according to the caſe of *R.* v. The Juſtices of *Herefordſhire*, *ante*, 3 *vol.* 504.; there having been a reaſonable interval between the execution of the order and thoſe Seſſions in which inquiry might have been made relative to the ſettlement of the paupers.

Lord KENYON, Ch. J. (ſtopping *Gally* in ſupport of the rule)— We ought not to decide haſtily againſt the words of an act of parliament: but ſome reaſonable time ought to be given to the pariſh appealing to enable them to inquire whether or not it will be

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The KING *againſt* The Juſtices of FLINT-SHIRE.

proper to enter an appeal. In this caſe the order of removal, which was made on the 24th of *September*, was kept in the overſeer's pocket until the eve of the Seſſions, and was then executed at the diſtance of more than fifty miles from the place where the appeal was to be lodged. And though the Seſſions were holden at *Mold* on *Thurſday*, in general they are holden on *Tueſday*, and the overſeers of *Leek* might fairly have conceived that the Seſſions for *Flintſhire* would be holden on the very next day after the order was executed. Under theſe circumſtances therefore I think that the juſtices at the following Seſſions in *January* ought to have received this appeal, and conſequently that this rule ſhould be made abſolute.

Per Curiam, Rule abſolute (*a*).

(*a*) Vid. *R.* v. *Juſtices of Wiltſhire*, 2 *Conſte's Bott*, 838; *R.* v. *The Juſtices of Glouceſterſhire, Dougl.* 191; and *R.* v. *The Juſtices of E. R. of Yorkſhire, Ib.* 192.

CHATER *againſt* BECKETT.

Wedneſday, May 10th.

A parol promiſe to pay the debt of another and alſo to do ſome other thing is void by the ſtatute of Frauds. The plaintiff cannot ſeparate the two parts of ſuch a contract.

THE firſt count of this declaration ſtated that the plaintiff was about and intended to ſue out a commiſſion of bankrupt againſt *J. Harris*, who was indebted to him in 500*l.*, and that preparatory thereto he had been put to great expence in procuring different meetings of *Harris*'s creditors, but that he was adviſed not to proſecute ſuch commiſſion but to proceed at law for the recovery of his debt; and that he had ſued out a ſpecial capias ad ſatisfaciendum againſt *Harris* &c; whereupon in conſideration that the plaintiff at the inſtance of the defendant would ſtay all further proceedings againſt *Harris*, and would accept certain bills of exchange drawn or accepted by the defendant for a certain part, to wit, 10*s.* in the pound of his ſaid debt as a ſatisfaction for the whole, the defendant undertook and promiſed to give the plaintiff ſuch bills for the ſame and to pay all the expences which the plaintiff had been put to in and about the ſaid intended commiſſion, the writ, and the meetings of the creditors; that the plaintiff ſtayed all proceedings againſt *Harris* and accepted ſuch bills &c, yet that the defendant had not paid the ſaid expences or any part thereof. The ſecond count was ſimilar to the firſt, except that it was confined to the coſts of ſuing out the writ; and the third count only varied from it in this reſpect, that it only extended to the coſts of the proceed-

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proceedings in the intended commiſſion of bankrupt. There were alſo the general counts for money paid, and for money had and received.

At the trial the plaintiff's counſel ſtated this caſe; that the plaintiff, who had ſtruck a docket againſt *Harris*, was induced not to proſecute the commiſſion of bankrupt, but to ſue him at law for the recovery of his debt, and having ſued out a writ againſt him, ſome of *Harris*'s creditors were anxious to take a compoſition for their debts provided all of them would agree to it; and to effect this ſcheme the plaintiff called ſeveral meetings of *Harris*'s creditors, at the laſt of which a compoſition of 10*s.* in the pound was propoſed, which all the creditors, except the plaintiff, conſented to take: but as the plaintiff had been put to great expences in ſtriking the docket againſt *Harris*, ſuing out a writ, and calling the creditors together, he would not agree to take that compoſition unleſs thoſe expences were alſo paid, in conſequence of which the defendant promiſed to pay thoſe expences and to accept bills drawn by the plaintiff on him to the amount of the compoſition. The plaintiff accordingly drew bills on the defendant to that amount, which the latter accepted and paid: but the defendant refuſing to pay the plaintiff's expences, amounting to 20*l.* 13*s.* the plaintiff paid them to the attorney, and brought this action to recover the ſame from the defendant on his undertaking. But this undertaking not being in writing, Lord *Kenyon* was of opinion that the caſe came within the ſtatute of Frauds (*a*), and nonſuited the plaintiff on his opening; referring to the caſe of *Read* v. *Naſh*, 1 *Wilſ.* 305. A rule niſi was obtained in the laſt term to ſet aſide the nonſuit; and when the caſe was now called on, the plaintiff's counſel ſaid that even though this were a caſe within the ſtatute of Frauds the plaintiff might recover on the general count for money paid to the uſe of the defendant.

Mingay and *Lawes* ſhewed cauſe againſt the rule for a new trial. The plaintiff is not entitled to recover either under the ſpecial or general counts; not under the former, becauſe the promiſe not having been reduced to writing the caſe falls within the ſtatute of Frauds; nor under the latter, becauſe this was not

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(*a*) By ſtat. 29 *Car.* 2. *c.* 3. *ſ.* 4. No action ſhall be brought whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt default or miſcarriage of another, unleſs the agreement upon which ſuch action ſhall be brought or ſome memorandum or note thereof ſhall be in writing &c.

money paid to the defendant's uſe. Firſt; in the firſt count it appears that this was an undertaking to pay *the debt of another;* and though it was an engagement to pay only a part of *Harris*'s debt, and was alſo a promiſe to do ſomething beyond payment of part of the debt, the promiſe is equally void under that act, it not having been reduced to writing. It is immaterial whether the ſuppoſed promiſe be to pay the whole or only a part of the debt of another: to decide that a defendant ſhall not be charged with the debt of another on a ſuppoſed parol promiſe to pay the whole of it, but yet that he may be charged with a part of the debt on ſuch a promiſe, would be eſtabliſhing a diſtinction that would defeat the object of the ſtatute of Frauds. And if this promiſe be void as to part under the ſtatute, as the agreement is entire, the plaintiff cannot recover on any part of it, as was expreſsly determined in Lord *Lexington* v. *Clarke*, 2 *Ventr*. 223. This objection equally applies to the other two ſpecial counts and alſo to the general counts. But another anſwer may be given to the general count for money paid: it was not money paid to the uſe of the defendant who never was liable to the payment of theſe ſums, but for the uſe of the plaintiff himſelf who alone was anſwerable for them.

Gibbs, and *Wigley*, in ſupport of the rule. Though the original promiſe to pay 10*s*. in the pound of *Harris*'s debt were within the ſtatute of Frauds, yet as the defendant afterwards accepted bills, in writing, drawn on him by the plaintiff for that compoſition, that was a promiſe in writing ſufficient to take the caſe out of the ſtatute. But if that were otherwiſe, there is no reaſon why the plaintiff ſhould not recover on the other part of the defendant's undertaking, which alone is now controverted, for the promiſe to pay the expences of the commiſſion, the meetings, and the former writ, was not a promiſe to pay the debt of another, ſince *Harris* was not liable to the payment of any of thoſe expences. And in *Read* v. *Naſh* (*a*) it was holden that a promiſe by the defendant, in conſideration that the plaintiff would withdraw his record in an action of aſſault againſt another perſon, to pay a certain ſum of money and the coſts, was not within the ſtatute of Frauds. *Williams* v. *Lepee*, 3 *Burr*. 1886, and 2 *Wilſ*. 308. But even if the plaintiff cannot recover on either of the ſpecial counts, he may recover on the general count for money

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(*a*) 1 *Wilſ*. 305.

paid to the uſe of the defendant. For if the agreement cannot be reſorted to becauſe it was not reduced to writing, it muſt be laid out of the caſe; and then the caſe is ſimply this, the plaintiff has paid a ſum of money for the defendant, and therefore he may recover it back again in an action for money paid to the uſe of the defendant.

Lord KENYON, Ch. J. When this cauſe came on to be tried, I referred to the caſe of *Read* v. *Naſh*, to ſhew that this was a caſe within the ſtatute of Frauds: and though the Court ruled that that caſe itſelf was not within the ſtatute, what was ſaid by Lord Ch. J. *Lee* is deciſive to ſhew that this promiſe is void by the ſtatute. That was an action not founded on any debt but for an aſſault; and he ſaid "*Johnſon* was not a debtor; the cauſe was not tried; he did not appear to be guilty of any default or miſcarriage; there might have been a verdict for him if the cauſe had been tried; he never was liable to the particular debt damages or coſts." Whereas in this caſe *Harris* was indebted to the plaintiff, and the defendant undertook to pay part of that debt and to pay certain other expences. The promiſe therefore was certainly void in part by the ſtatute; and the agreement being entire, the plaintiff cannot now ſeparate it and recover on one part of the agreement, the other being void. And if that agreement be void, there is an end of the caſe; for where there is an expreſs promiſe, another promiſe cannot be implied. I lament extremely that exceptions were ever introduced in conſtruing the ſtatute of Frauds; it is a very beneficial ſtatute, and if the Courts had at firſt abided by the ſtrict letter of the act it would have prevented a multitude of ſuits that have ſince been brought.

GROSE, J. It ſeems admitted that part of this promiſe is void by the ſtatute: but it was one indiviſible contract, and the plaintiff cannot recover on any part. Then it is urged that the plaintiff may recover on the general count: but in order to ſupport that count there ſhould be evidence of the plaintiff having paid a ſum of money that the defendant was bound to pay; whereas here the plaintiff, not the defendant, was bound to pay theſe expences.

LAWRENCE, J. It is clear that the plaintiff cannot recover on the ſpecial counts. Then the queſtion is, Whether on the tranſaction as ſtated he can ſupport the general count for money paid to the uſe of the defendant? The defendant's was not a promiſe to pay the attorney but to pay the plaintiff the expences that he had incurred: but the plaintiff was originally liable to pay theſe expences to his own attorney; and when he paid them he only paid his own debt; therefore this cannot be conſidered as money paid to the uſe of the defendant.

Rule diſcharged.

CAILLAND *againſt* CHAMPION.

Thurſday, May 11th.

If the venue be changed from *A.* to *B.* on the uſual affidavit that the cauſe of action aroſe wholly in *B.*, when in fact part of the cauſe of action aroſe in another county, the Court will order the venue to be brought back to *A.*

THIS was an action on a policy of inſurance on the life of a perſon who lately died in *Scotland*, and it was brought in *Middleſex*. The defendant changed the venue (*a*) to *London*, on the uſual affidavit that the cauſe of action aroſe wholly in *London*. After which a rule was obtained calling on the defendant to ſhew cauſe why the former rule for changing the venue to *London* ſhould not be diſcharged, on the ground that the venue had been improperly removed to *London*, becauſe the fact ſworn to by the defendant could not poſſibly be true, namely, that the *whole* cauſe of action aroſe in *London*, the party whoſe life was inſured having died in *Scotland*.

The Court were now of opinion that the venue ſhould not have been originally removed from *Middleſex* to *London* for the reaſon abovementioned; and therefore they made this

Rule abſolute.

Holroyd in ſupport of the rule.

Giles againſt it.

(*a*) Vid. *Howarth* v. *Willett*, 2 *Str.* 1180; *Andr.* 66; *Kirk* v. *Broad*, *Say.* 7. and *Watkins* v. *Towers*, *ante*, 2 vol. 275.

HARRIS *againſt* STAPLETON.

Thurſday, May 11th.

A clauſe of redemption contained in the body of an annuity deed muſt be inſerted in the memorial.

THIS was an application under the 17 *Geo.* 3. *c.* 26. to ſet aſide a judgment on a warrant of attorney for ſecuring an annuity, becauſe a clauſe of redemption contained in the body of the deed whereby the annuity was granted was not inſerted in the memorial.

Mingay and *Ruſſell* ſhewed cauſe againſt the rule in the laſt term; and endeavoured to diſtinguiſh this from the caſe of *Stedman* v. *Purchaſe* (*b*), on the ground that the clauſe of redemption was there indorſed by way of memorandum on the back of the deed ſecuring the annuity, and was conſidered as a diſtinct

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(*b*) *Ante*, 6 vol. 737.

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inſtrument, though forming part of the ſame aſſurance; and the act of Parliament requires that a memorial of every inſtrument &c. ſhall be enrolled.

The Court then ordered the caſe to ſtand over till this term, ſaying that there was a ſimilar queſtion then pending in the Court of Exchequer.

Mingay and *Garrow* ſhewed cauſe again on this day, and relied on the ſame diſtinction which was taken before. But

The Court ſaid that the caſe of *Stedman* v. *Purchaſe* could not be diſtinguiſhed from the preſent in ſubſtance; and that the ſame opinion had been given upon a ſimilar caſe in another Court.

Erſkine was to have argued in ſupport of the rule.

Rule abſolute (*a*).

(*a*) *Vid. Dalmer* v. *Barnard*, *poſt.*—It was further urged in ſupport of the judgment and againſt this rule that the grantor's attorney undertook to make the memorial and would not let the grantee's attorney ſee it, and therefore if it were defective the grantor ſhould not avail himſelf of his own attorney's miſconduct. The Court upon this did not at firſt make the rule abſolute, but ordered the matter to ſtand over for the grantor's attorney to explain this charge againſt him; which was afterwards explained, and then the rule was made abſolute.

Thurſday, *May* 11th.

DAVIS *againſt* HUGHES.

Though judgment has been irregularly ſigned without filing common bail for the defendant according to the ſtatute till after the ſucceeding term after the writ was returnable and after the judgment itſelf has been entered up, yet the defendant having given a cognovit is eſtopped from objecting to the irregularity, if before the time of making ſuch objection the plaintiff has filed common bail nunc pro tunc.

ESPINASSE obtained a rule calling on the plaintiff to ſhew cauſe why the judgment which had been ſigned in this cauſe ſhould not be ſet aſide, and the goods levied under an execution iſſued under ſuch judgment reſtored to the defendant. It appeared that the writ was returnable in *Trinity* term laſt, at which time the defendant gave a cognovit, but judgment had not been ſigned till *Hilary* term laſt, after which in the ſame term common bail was filed. This he contended to be irregular according to the caſe of *Smith* v. *Painter* (*c*), where it was held that the plaintiff cannot file common bail according to the ſtatute after the ſucceeding term after the writ is returnable. Whereas here that time was not only paſſed, but common bail was not filed and conſequently the appearance of the defendant was not recorded till after the judgment had been entered up.

Erſkine, contrà, admitted the irregularity, but contended that the defendant was eſtopped from objecting to it, after having admitted the juſtice of the demand by giving a cognovit. And he ſaid that it was ſufficient that the judgment now appeared on the record to

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(*c*) *Ante*, 2 vol. 719.

have been regularly entered up, the plaintiff's having ſince filed common bail nunc pro tunc for the defendant.

And of this opinion were the Court.

Rule diſcharged (*a*).

(*a*) In *Walker* v. *Woolley*, *H.* 37 *Geo.* 3. *B. R.* judgment had been ſigned upon a cognovit without firſt filing a bill; which was holden to be irregular: but it having been done at the requeſt of the defendant to ſave expence, the Court granted leave to file the bill nunc pro tunc, and directed the defendant to pay all the coſts.

Harrison *againſt* Jackson, Sykes, and Rushforth.

Friday, May 12th.

One partner cannot bind the other partners by deed.

THIS was an action of covenant upon an agreement of three parts ſtated in the declaration to have been made on the 10th of *July* 1794 between the defendants, deſcribing them as merchants and partners of the firſt part, *W.* and *J. Harriſon* of the ſecond part, and the plaintiff of the third part, of one part of which ſaid agreement, as being ſealed with the ſeal of the ſaid *W. Sykes* for himſelf and the other two defendants, the plaintiff made a profert in court. The declaration then ſtated the agreement and covenant of the defendants, the ſubject-matter of which agreement and covenant appeared on the agreement to be a partnerſhip tranſaction on the part of the defendants, and to have been entered into on a full and valuable conſideration received by them as partners. The declaration then ſtated the breach of covenant, whereby the plaintiff had ſuſtained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Iſſue being joined, the cauſe was tried at the ſittings after *Hilary* term 1797 before Lord *Kenyon* at *Guildhall*, when the jury found a verdict for the plaintiff damages 477 *l.* 13 *s.* 9 *d.* and coſts 40 *s.*, ſubject to the opinion of this Court on the following caſe.

The defendants were partners. The agreement ſtated in the declaration was produced; and the ſubſcribing witneſs proved that it was executed in his preſence by the defendant *Sykes* in the following form;—"For *Jackſon*, Self, and *Ruſhforth*; *W. Sykes*:" But neither *Jackſon* or *Ruſhforth* was preſent at the execution. The queſtion for the opinion of the Court was, whether ſuch execution of the agreement by the defendant *Sykes* were binding on the other defendants *Jackſon* and *Ruſhforth*.

Dampier for the plaintiff. As the deed was executed by one partner in a partnerſhip tranſaction for a full and valuable conſideration received by all the partners, it is binding on them although they were not all preſent. "One piece of wax may ſerve for all the grantors if every one put his ſeal on the ſame piece of wax, or another do ſo for them." *Perk. Sect.* 134. In *Mears* v. *Serocold* (*a*), the defendant pleaded non eſt factum to an action brought on a joint and ſeveral bond; at the trial it appeared that *Jackſon* was in partnerſhip with *Scrocold* when the bond was given, and that the conſideration of the bond was a partnerſhip debt due from *Jackſon* and *Serocold* to the plaintiff, and that *Jackſon* firſt executed the bond for *Serocold*, and then for himſelf; Lord *Mansfield* ruled that for a partnerſhip debt one partner had authority to execute a bond for another, and thereupon directed a verdict for the plaintiff. Now that is a ſtronger caſe than the preſent, becauſe there the action was brought againſt the partner who did not execute the bond and not againſt him who did, the bond being ſeveral as well as joint. In the caſe of ſimple contract debts it will be admitted that one partner may bind the reſt by his own acts. In the inſtance of drawing and accepting bills it is in every day's practice. So, if an action be brought againſt ſeveral perſons, one may enter an appearance for the reſt, which may in its conſequences lead to a judgment againſt all. Then in point of reaſon there is no objection to one partner binding the others by a deed in a partnerſhip concern where the conſideration money is applied to the benefit of all the partners. And in ſome inſtances it would be highly inconvenient if one partner had not that power; as where the partners are at a diſtance from each other and a creditor preſſed one of them for a ſecurity for his debt, if that one had the power of binding the others by a deed, it might prevent the partnerſhip effects being ſeized in execution by a creditor who would not be ſatisfied with a leſs ſecurity than a deed. And though in *Ball* v. *Dunſterville* and another (*b*), where one partner executed a deed for himſelf and his partner *in the preſence of the other*, the Court laid ſtreſs on the laſt circumſtance, it may be obſerved that that was only a partnerſhip in that ſingle tranſaction, whereas here the defendants were general partners. But however limited in this reſpect may be the power of partners not conſtituted ſuch by deed, if this were a partnerſhip

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(*a*) Sittings in *Eaſter* Term 1785 at *Guildhall*, cor. Lord *Mansfield* Ch. J.

(*b*) *Ante*, 4 vol. 313.

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conſtituted by deed, that gave authority to all the partners to bind one another by deed.

Giles for the defendants. It not appearing in this caſe that *Sykes*, who executed the deed for himſelf and his partners, had any authority from the others to bind them by deed, it muſt be taken that he had no ſuch authority; the execution therefore, as far as it affects them, muſt reſt wholly on the general power, which is incident to the relation of partners. But the law recognizes no ſuch general power, by which one partner may bind the reſt by deed. In this reſpect the inſtance of one partner acting for the others is analogous to the caſe of an agent acting for his principal, who cannot bind his principal by deed without being authoriſed by deed ſo to do. *Com. Dig.* "Attorney" (C. 1.) and (C. 5.) Neither can an attorney, who is only authoriſed by parol, make a feoffment and livery. 2 *Rol. Abr.* 8. R. *pl.* 4.; or a leaſe for years; 3 *Bac. Abr.* 408. In the caſe of *Horſley* v. *Ruſh* and *Tolſon* (*a*), which was an action of covenant on a charter-party, to which the defendants pleaded the general iſſue, it appearing that the deed was executed by "*G. Dwyer*, by order and for account of Meſſrs. *Ruſh* and *Tolſon*," but that *Dwyer* had only a verbal authority from the defendants to execute the charter-party, Lord *Kenyon* held that the action could not be maintained; for that a deed could not be executed by an agent ſo as to bind the principal unleſs he were authoriſed by deed under ſeal, and that though one partner might bind another by written inſtruments he could not do ſo by deed without a ſpecial power under ſeal for that purpoſe. This is diſtinguiſhable from the caſe of *Mears* v. *Serocold;* for there perhaps one partner was authoriſed to execute the deed for the reſt; and in the caſe of *Ball* v. *Dunſterville* the execution by one was *in the preſence of the other*, on which circumſtance the Court principally relied. And independently of authorities, it would be attended with miſchievous conſequences if one partner could bind the others by deed, for that would affect not only the partnerſhip effects but it would alſo bind the lands of the other partners even in the hands of their heirs.

Dampier in reply. This is not like the caſe of an agent acting for his principal, for he cannot bind the principal beyond the ſcope of the particular power given to him: but the power that each partner has ariſes out of the intereſt that he has in the partnerſhip concerns and from the dominion that he has over the partner-

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(*a*) Guildhall, Sitt. after *Mich.* 1788.

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partnerſhip effects. And in anſwer to the argument that if one partner may bind another by deed he may affect the lands of that other even in the hands of the heir, it may be remarked that the ſame conſequence may follow from permitting one partner to enter an appearance to an action for the others, ſince the judgment to be ſigned in ſuch action will equally bind the lands of the other partners.

Lord KENYON, Ch. J. I ſhould be ſorry to have it ſuppoſed that this caſe was reſerved from the leaſt particle of doubt that I had on the ſubject: the parties came to niſi prius with the facts admitted on both ſides; for if the caſe had been opened there, I ſhould certainly have given a deciſive opinion againſt the plaintiff. The law of merchants is part of the law of the land; and in mercantile tranſactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the reſt. But the power of binding each other by deed is now for the firſt time inſiſted on except in the niſi prius caſe cited, the facts of which are not ſufficiently diſcloſed to enable me to judge of it's propriety. Then it was ſaid that, if this partnerſhip were conſtituted by writing under ſeal, that gave authority to each to bind the others by deed: but I deny that conſequence juſt as poſitively as the former; for a general partnerſhip agreement, though under ſeal, does not authoriſe the partners to execute deeds for each other, unleſs a particular power be given for that purpoſe. This would be a moſt alarming doctrine to hold out to the mercantile world; if one partner could bind the others by ſuch a deed as the preſent, it would extend to the caſe of mortgages, and would enable a partner to give to a favourite creditor a real lien on the eſtates of the other partners.

Per Curiam, Poſtea to the defendants.

Friday, *May* 12th.

BURNETT *againſt* KENSINGTON.

If an inſurance be effected on fruit, and the policy contain the uſual memorandum, " corn, fruit &c. warranted free from average unleſs general or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the underwriters are liable for an average loſs ariſing from the perils of the ſeas, though no part of the loſs ariſe from the act of ſtranding.

THIS was an action by the aſſured againſt the underwiter on a policy of inſurance on fruit on board the ſhip *Commerce* at and from *Malaga* and *Velez Malaga* to *Plymouth* and *Portſmouth;* in which was contained the uſual memorandum, whereby corn, fiſh, ſalt, fruit, flour, and ſeed were warranted free from average unleſs general *or the ſhip ſhould be ſtranded* &c.

The

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The plaintiff by his declaration averred that the ſhip ſet ſail for *Malaga* on her intended voyage, but *by the perils of the ſea was ſtranded* bulged and deſtroyed, and the goods on board were wholly loſt to the plaintiff &c.

At the trial before Mr. Juſtice *Lawrence* and a ſpecial jury at the ſittings at *Guildhall* after laſt *Michaelmas* term, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe.

The plaintiff on the 15th *January* 1795 cauſed the aſſurance in queſtion to be made upon a cargo of fruit on board the ſhip *Commerce*. The defendant ſubſcribed the ſame for 150*l*. The plaintiff was intereſted in the cargo beyond the amount of the ſum inſured, and the aſſurance was effected in his name, and for his benefit. On the 30th *November* 1794 the ſhip ſailed with convoy from *Malaga* with her cargo conſiſting of oranges and lemons to be delivered at *Portſmouth* and *Plymouth*, and afterwards parted with her convoy in a gale of wind. On the 29th *January* 1795 in the courſe of her voyage ſhe arrived off *Scilly*, and between the hours of ſeven and nine on the morning of that day ſtruck upon a ſunken rock about three leagues and a half from the land of *Scilly;* but ſhe did not remain on the rock, but in conſequence of the ſtriking thereon ſeveral of her planks were ſtarted, and the water immediately after flowed into the hold and over the cargo, and continued to increaſe in the hold for about three hours and an half. About twelve o'clock on the ſame day the ſhip was ſtranded upon the Beach at *Scilly*. She was ſo ſtranded by the captain under the directions of a pilot, who had come on board her from the ſhore, in order to ſave the ſhip and cargo. The ſhip continued ſome time upon the Beach, during which the water again flowed in and over part of the cargo at the return of the tide. The ſhip afterwards proceeded on her voyage, and arrived at *Plymouth* on the 24th *February* following with the greateſt part of her cargo. The cargo of fruit was very much damaged, and a ſmall part thereof left at *Scilly*, being entirely unfit for uſe. *The ſhip received no damage in conſequence of the ſtranding*. The damage ſhe received was entirely from the rock on which ſhe ſtruck: part of the damage the cargo received was occaſioned by the water flowing into the ſhip previous to her being laid on the Beach, and part was occaſioned by the water that flowed in ſubſequent to the time of her being laid on the Beach. But the cauſe of the water flowing in aroſe entirely from

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from the ſhip ſtriking on the rock, and not from any miſchief done to the ſhip by the ſtranding. The queſtions were, firſt, Whether the plaintiff were entitled to recover for all the damage received by the cargo? if he were, then the verdict was to ſtand; or ſecondly, Whether the plaintiff were entitled to receive for ſuch part only of the damage as was occaſioned to the cargo by the water that flowed in ſubſequent to the time of the ſhip being laid on the beach?—in that caſe a verdict was to be entered for ——*l.* But if the Court ſhould be of opinion that the plaintiff was not entitled to recover any thing, then a verdict was to be entered for the defendant.

The defendant paid the general average into court.

This cauſe was firſt tried at the ſittings at *Guildhall* after *Michaelmas* term 1795; when one of the queſtions made was, Whether the ſhip had been ſtranded within the meaning of the policy? the plaintiff then contending that any grounding and fixing of the ſhip was a ſtranding; and the defendant inſiſting that nothing was to be deemed a ſtranding, unleſs ſuch a fixing of the veſſel on the ground as that the cargo or the voyage was thereby loſt, and not as in the preſent caſe where the ſhip got off and afterwards reached her deſtined port with her cargo. Upon that occaſion the Jury found a verdict for the defendant, ſaying, *that they thought it was not a ſtranding if the veſſel got off the ground and proſecuted her voyage; but that ſtranding meant where ſhe took to the ground and bulged, ſo as to be incapable of proceeding on her voyage.* A motion was made for a new trial in the ſucceeding term, upon the ground that what was a ſtranding was a queſtion of law, and that the jury had found their verdict upon a miſapprehenſion of the law as applied to this caſe. The queſtion was much diſcuſſed at the bar: and Lord *Kenyon* ſaid that he ſhould have conſidered this as a ſtranding; but he had left it to the Jury, not as a matter of law, but as to what was the meaning among merchants of a mercantile word in a mercantile inſtrument. The Court thought it a caſe of great doubt and conſequence, and directed a new trial; deſiring to hear what evidence could be adduced of the commercial uſage which had obtained in this reſpect.

Upon the ſecond trial Lord *Kenyon* left it to the Jury to find the fact of ſtranding one way or the other; the parties having agreed, if that point were aſcertained in favour of the plaintiff, to leave the amount of the damage to arbitration. But the Jury delivered

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delivered their verdict in writing as follows; "We think this "accident attended with all the inconveniences of a ſtranding; "and therefore think that the plaintiff is entitled to a particular "as well as to a general average." Upon this a new trial was afterwards obtained in *Eaſter* term 36 *Geo.* 3. on the ground that the Jury had omitted to find the very point in iſſue, namely, whether the ſhip were or were not ſtranded.

The cauſe went to trial a third time, when the Jury found that the veſſel was ſtranded, but that the damage did not ariſe from the ſtranding, and therefore they found for the defendant. Upon which a rule was obtained in *Michaelmas* term 37 *Geo.* 3. calling upon the defendant to ſhew cauſe why the verdict ſhould not be ſet aſide; againſt which the defendant's counſel ſhewed cauſe, inſiſting upon the neceſſity of the plaintiff's proving that the damage aroſe from the ſtranding in order to entitle himſelf to recover; whereas it appeared to have proceeded from the periſhable nature of the commodity inſured, or from that and other previous cauſes combined. But the plaintiff's counſel objected to the verdict on the ground of ſurpriſe; having underſtood that the only queſtion intended to be agitated at the trial was, Whether there had been a ſtranding or not? and that if a ſtranding, the amount of the damage was to be left to an arbitrator to determine; he was not prepared at the time with evidence to ſhew that the damage had ariſen from the ſtranding, which otherwiſe he could have done, and therefore requeſted to have an opportunity of bringing forward that part of his caſe. And *the Court* aſſenting to the propriety of that requeſt made the rule abſolute for a new trial; Lord *Kenyon*, Ch. J. at the ſame time intimating a ſtrong opinion that if the loſs happened from any peril inſured againſt, and the ſhip were at any time ſtranded in the proſecution of the voyage, the particular average loſs ought at any rate to be paid by the underwriter, upon the conſtruction of the words of the memorandum in the policy.

Upon the fourth trial the Jury found the facts as ſtated in the caſe abovementioned. And in the laſt term *Cowper* argued for the plaintiff, and *Scarlett* for the defendant, when the Court directed a ſecond argument; and accordingly on this day it was argued by *Park* for the plaintiff, and *Erſkine* for the defendant.

Arguments for the plaintiff. The fact of ſtranding being now found for the plaintiff, the queſtion is reſolved into what is the true conſtruction of the memorandum in the policy. This,

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though a mercantile inſtrument, muſt like all other written contracts be conſtrued by courts of law according to general legal rules, unleſs there has been an uniform uſage giving it a certain meaning, as part of the law merchant: but no ſuch uſage exiſts, as was declared by a ſpecial Jury of merchants at Guildhall to Lord *Kenyon* in a caſe hereafter mentioned, of *Bowring* v. *Elmſlie*, upon a ſimilar queſtion in 1790, and none ſuch is found by the preſent caſe. The general rule, as ſtated by Lord *Kenyon* in the caſe laſt referred to, for conſtruing written inſtruments containing exceptions, is this; "to let the exception control the inſtrument as far as the words of it extend, and no further, and then upon the caſe being taken out of the letter of the exception, the body of the inſtrument operates in full force." To apply that to the preſent caſe; by the general terms of the policy the underwriter would be liable for average loſſes on fruit as well as on any other goods: but by the memorandum an exception is made to ſuch a reſponſibility in the caſe of fruit &c. except in two caſes, *viz.* where the average is general, or where the ſhip is ſtranded. Therefore if the perils of the ſea be ſo great as to occaſion a ſtranding, the caſe being taken out of the letter of the exception, it leaves the queſtion to be governed by the general words as if no ſuch exception had been made. The excepting clauſe was firſt introduced in 1749, and might have been more properly expreſſed by ſaying "free from particular average unleſs the ſhip be ſtranded;" which would conſequently have left the underwriter liable in all caſes to general average; and if the ſhip were ſtranded, then to particular average. Now whether the words be conſtrued to make a condition or an exception is for the preſent purpoſe the ſame thing; in the one caſe the condition has been performed, in the other the excepted caſe has happened. Not only the grammatical conſtruction is in favour of the plaintiff, but it is alſo warranted by the reaſon of the thing. The clauſe was framed upon the principle of mutual conceſſion between the aſſured and the underwriters. By the one it was admitted that certain commodities, being of a periſhable nature, were more likely to be rendered uſeleſs in the courſe of a voyage by their own deteriorating qualities than by the common perils of the ſea; and therefore they agreed not to charge the underwriters for particular average loſſes which common experience ſhewed were more generally to be attributed to internal defects than to external injuries. On the other hand the underwriters con-

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ſented that if the perils of the ſea were ſo great as to cauſe a ſtranding, they would attribute the injury to this probable and viſible cauſe rather than to the other preſumptive one; becauſe from the very nature of the thing it would be attended with great difficulty litigation and expence to diſtinguiſh how much of the loſs was attributable to the one and how much to the other cauſe. Beſides, it is in favour of the underwriter that the ſhip ſhould be ſtranded rather than that there ſhould be a total loſs, for which he would at all events be liable to the whole extent of the value inſured: it was therefore his intereſt in this inſtance to let in the general operation of the policy, as an encouragement to thoſe concerned to ſave as much of the cargo as poſſible, rather than endeavour to convert every ſuch misfortune into a total loſs. As to the objection that this may open a door to fraud by holding out a temptation to ſtrand the ſhip deſignedly when the commodity has been before materially injured; it is ſufficient to ſay that whether the ſtranding be *bonâ fide* or not is always a queſtion of evidence: and there is as ſtrong an objection on the other ſide, for if this conſtruction do not prevail, every caſe of a ſtranding will be turned into a total loſs; in which caſe the fraud will be more difficult to detect. The caſes in which this particular point has come in judgment have alſo adopted the ſame conſtruction on this branch of the clauſe in queſtion. *Cantillon* v. *The London Aſſurance Company* (*a*), which was in 1754, is entitled to the more weight becauſe it may be conſidered as a cotemporaneous deciſion on the meaning of it. There Lord Ch. Juſt. *Ryder* conſidered it in the nature of a condition, and that by the ſhip's being ſtranded the aſſured was let in to prove his whole partial loſs. It appears clearly from the report of the ſame caſe in *Magens* (*b*) that the damage could not have ariſen from the mere act of ſtranding; for it is there ſtated that the ſhip in going down the river *Thames* merely touched the ground; and yet the average loſs which the underwriters were condemned to pay was, as he ſtates, conſiderable. No new trial was moved for, but that conſtruction has been acquieſced in ever ſince: for from that time the Inſurance Companies have ſtruck out the words "or the ſhip be ſtranded" from their policies. The queſtion does not appear to have occurred again till the caſe of *Bowring* v. *Elmſlie*, *London* Sittings after *Trinity* 1790, where Lord *Kenyon* who tried the cauſe ſeems to have been of the ſame opinion with

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(*a*) Cited in *Wilſon* v. *Smith*, 3 *Burr*. 1553.

(*b*) 2 *Mag*. 385.

Lord Ch. Juſt. *Ryder* (*a*). The caſe of *Wilſon* v. *Smith* (*b*) is relied on by the defendant as having eſtabliſhed a different conſtruction upon the exception in the memorandum: but that caſe is very diſtinguiſhable from the preſent; for there the queſtion aroſe upon the other branch of the exception, namely, where the average was general. That was an attempt to recover a partial loſs on a cargo of corn ariſing from a ſtorm, in which the ſhip was *not* ſtranded, becauſe there had alſo been a general average loſs incurred by cutting away the cable and anchor and running into port to refit for the ſafety of the ſhip and cargo. The Court properly held that a ſtipulation that the underwriter ſhould be free

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(*a*) The following note of that caſe was read :—" This was an action upon a policy of aſſurance on fiſh on board the ſhip *Nymph* from *Chaleur Bay* to her port or ports of diſcharge in *England*, *Ireland*, *Portugal*, *Spain*, or *Italy*, warranted to ſail on or before the 20th *September* 1788. The uſual memorandum, by which fiſh, *&c.* was warranted free from average, unleſs general, or the ſhip were ſtranded, was added. The action was brought to recover an average loſs ſuſtained by the fiſh, the ſhip having been, as the plaintiff alleged, *ſtranded*; that is, ſhe was in ſuch a leaky condition that the captain and crew thought it neceſſary to run her aſhore off *Malaga* for their own preſervation, thinking it would be impoſſible to get her into port. For the defendant it was contended that there was no neceſſity for running the ſhip on ſhore, but that it had been done with a fraudulent intention. Secondly, that ſuppoſing the ſhip to have been unavoidably ſtranded, the greater part of the damage ſuſtained by the fiſh was occaſioned by its having been too long on board and not by any defect in or the ſtranding of the ſhip.

Lord *Kenyon*, Ch. J. ſummed up thus to the Jury. The queſtion in the cauſe is whether a partial average can be recovered; and this in the *firſt* place depends upon the opinion you ſhall be of with reſpect to the ſhip's having been ſtranded. I think that the ſhip being on ſhore in the manner ſhe is repreſented to have been would be a ſtranding within the meaning of the memorandum. But the doubt is whether the running her on ſhore was done for the beſt, or in execution of a fraudulent deſign. The plaintiff's witneſſes ſtate it to have been of neceſſity; but on the other hand it appears that there was not any probable ground for apprehending ſerious danger. There were not more than five inches water in the hold, and the pumps were all in order; it was in open day, and but little wind; however it is for you to decide upon the whole of the evidence whether the captain and the crew acted *bonâ fide* and ran the ſhip on ſhore becauſe they really thought ſhe could not ſafely be got into *Malaga*. If you think that they did, then ariſes a further queſtion upon the conſtruction of the memorandum at the foot of the policy. This like the policy itſelf muſt be interpreted by the uſage of merchants. [The merchants in court here ſignified to his Lordſhip that there was no uſage upon the ſubject; the queſtion had not before occurred, and was now for his deciſion.] His Lordſhip then obſerved that the general mode of conſtruing deeds to which there are exceptions is to let the exception control the inſtrument as far as the words of it extend and no further; and then upon the caſe being taken out of the letter of the exception, the deed operates in full force. That agreeably to this rule it ſeemed to him that the ſtranding of the ſhip put fiſh in the ſame condition as any other commodity not mentioned in the memorandum; and the underwriters were liable for all damage ſuſtained by it; for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe by the perils inſured againſt, and how much by the periſhable nature of the commodity, which was the very thing that the memorandum was intended to prevent. A verdict was given for the defendant upon the ground of the ſhip having been run on ſhore fraudulently."

(*b*) 3 *Burr.* 1550.

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from average unleſs a *general* one could not be held to make him liable alſo for a *ſpecial* average. No queſtion of ſtranding aroſe there; and what was ſaid by the Court on that ſubject is at moſt but ambiguouſly expreſſed in favour of the defendant's conſtruction, though if it had been much more plainly in his favour it would only have amounted to an obiter dictum. Neither was there a ſtranding in the caſe of *Cocking* v. *Frazer* (*a*): and what was ſaid by *Buller* J., that the underwriter in theſe caſes had never been held liable but where there had been a total loſs of the commodity, was with reference to the facts of the caſe, where the aſſured went as for a total loſs, though the commodity itſelf, which was fiſh, exiſted, but was in a putrified ſtate; it being the very object of the memorandum to guard againſt the underwriter's liability under ſuch circumſtances. The laſt caſe, in which the queſtion collaterally aroſe, was that of *Neſbitt* v. *Luſhington* (*b*): There a mob having ſeized a veſſel laden with corn, and ſtranded her, took away part of the cargo; and the Court held that the aſſured could not recover upon a count ſtating the loſs to be by a ſeizure *by people;* that word in the policy meaning *the ruling power of the country.* But there Lord *Kenyon* expreſsly ſaid "that on the meaning of the memorandum he had no doubt: It was inſerted," he ſaid, "to prevent diſputes; and the underwriters thereby expreſsly provided that they ſhall not pay any average upon the articles enumerated, unleſs it be general, or the ſhip be ſtranded. That when a ſhip is ſtranded the underwriters agree to aſcribe the loſs to the ſtranding, as being the moſt probable occaſion of it, though the fact cannot always be aſcertained." It is true that Mr. Juſtice *Buller* ſaid that the aſſured can only recover in ſuch a caſe "where the loſs ariſes from the ſtranding of the veſſel." But it does not appear that he meant to uſe thoſe words in contradiction to the opinion expreſſed by Lord *Kenyon;* but rather in contradiſtinction to loſſes ariſing from ſome other independent cauſe, not connected with ſtranding. The caſe of *Jones* v. *Schmoll* (*c*) is alſo relied on as ſhewing that the aſſured can only entitle himſelf to recover by proving that the loſs ſuſtained was a direct and immediate, and not a remote, conſequence of the peril inſured. That might apply if the words here had been that the underwriter would not be liable for the loſs "unleſs *by* ſtranding;" but the words are "unleſs the ſhip be

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(*a*) *E.* 25 *Geo.* 3. *Vi. Park on Inſurance,* 1ſt edit. 22 and 129.

(*b*) *Ante,* 4 vol. 783.

(*c*) Cited *ante,* 1 vol. 130.

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ſtranded." And here the loſs was incurred by the immediate conſequence of a peril inſured againſt, namely, *the peril of the ſea*, of which ſtranding was the conſequence. The manner of declaring in this caſe is not that the loſs happened by ſtranding, but by the perils of the ſea; although by virtue of the memorandum it was alſo neceſſary in this caſe to prove a ſtranding. But even if the Court had a doubt upon the general conſtruction, the plaintiff would ſtill be entitled upon this finding; for there is no pretence to ſay that the cargo was damaged before the ſhip ſtruck on the rock and let in water; and as there was not an interval of more than five hours from that time before the ſhip was ſtranded, it muſt be taken to be all one act, and ſo the loſs attributable to the ſtranding. In all probability the greater part was ſo, and it is impoſſible to draw the line. The rule of conſtruction contended for by the plaintiff will obviate any ſuch difficulty; whereas according to the defendant's rule he will be liable at leaſt for that part of the damage which happened after the ſtranding, and while the ſhip lay on the ſhore, of which it is impoſſible to form any accurate eſtimate.

Arguments for the defendant. The finding of the jury is concluſive that none of the injury to the cargo is attributable to the ſtranding; for though ſome of it happened afterwards, yet that is found to have ariſen from the prior accident of the ſhip's ſtriking upon a rock. The queſtion therefore comes to this, whether if the injury happen from a cauſe for which the underwriters are not liable for a particular average, and any time afterwards in the courſe of the voyage the ſhip happen to be ſtranded, though no injury reſult therefrom to the cargo, the underwriters are ſtill liable; or whether they are only liable for damage reſulting from the ſtranding. The exception in the memorandum muſt be conſtrued with reference to the contract of which it is a qualification. By the general terms of the policy the underwriter inſures againſt the perils of the ſeas: but it was conſidered that there were ſome commodities (amongſt which fruit is one) ſo ſubject to deterioration from their very nature that it was impoſſible in moſt caſes to aſcertain whether any or how much damage could be aſcribed to the perils of the ſea, and how much to it's own periſhable nature: but ſtranding was a miſchief of ſo notorious a kind, that it was deemed reaſonable to allow of ſuch an inveſtigation in that inſtance, becauſe the inquiry could be made re-

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cently after the fact, when reaſonable certainty could be attained upon the ſubject. If there be a ſtranding, primâ facie perhaps the underwriters might be held liable for a partial loſs; but this ought not to eſtop them from ſhewing that the loſs aroſe from ſome other cauſe, as from an inherent defect in the commodity. But if there be a doubt upon the manner in which the exception is worded, viz. "unleſs the ſhip be ſtranded," it is fair to conſtrue it by analogy to other parts of the ſame inſtrument. Now the conſtruction which prevails in reſpect to evidence of loſſes in general is that the aſſured ſhall ſhew that the injury ſuſtained reſults immediately from ſome particular peril inſured againſt, as was held in *Jones* v. *Schmoll* (*a*). But this is an attempt to recover upon a loſs unconnected with the peril inſured againſt. The plaintiff ſeeks to recover an average loſs on fruit on account of a damage ſuſtained by the perils of the ſeas; but the underwriter has refuſed to undertake againſt ſuch a peril by the ſtipulation in the memorandum. Then the plaintiff attempts to fix him by ſhewing that the ſhip was ſtranded in the courſe of the voyage, although that fact happened after the injury ſuſtained. This is contrary to the whole ſpirit of the engagement between the parties, which is for the purpoſe of indemnification, and not of wagering. The object of the inſurance is not to indemnify the party againſt the happening of the perils themſelves, but againſt the injurious conſequences of thoſe perils. But if this could be ſuſtained it would follow that if a partial loſs happened by the reſtraint of princes, yet if the ſhip were afterwards ſtranded in the courſe of her voyage, the aſſured might recover although that part of the commodity was not on board at the time of the ſtranding. But it cannot be ſuppoſed that ſuch was the meaning of the contracting parties. According to the plaintiff's conſtruction the underwriter is now in a worſe ſituation in this reſpect than he was before the introduction of the memorandum, although it is admitted to have been introduced for his benefit. For before that, he might have ſhewn that the injury complained of did not ariſe from any peril inſured againſt, but from the periſhable nature of the commodity, even where the ſhip had been ſtranded: but it is now contended that he is precluded from any ſuch proof; and has agreed, if there be a ſtranding in fact, to attribute the damage at all events to that cauſe:

(*a*) *Ante*, 1 vol. 130. *n.*

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whereas the very object of the memorandum was to prevent the fraud of the aſſured in attributing that damage to the perils of the ſeas, which more probably aroſe from the bad quality of the thing inſured. The plaintiff's conſtruction will let in all that fraud whenever there happens to be a ſtranding; and when the commodity is in a bad ſtate, it will be a temptation to ſtrand the veſſel. But according to the defendant's conſtruction no ſuch inconvenience will ariſe. The crew for their own ſakes are intereſted to prevent a total loſs at ſea; but in the caſe of ſtranding they are intereſted to ſave themſelves at the expence of the ſhip and cargo. The intereſt of the underwriter was to prevent that loſs, and to intereſt the crew in ſaving what they could by agreeing to pay the average loſs in that caſe whether partial or general. This object will be defeated if the underwriters are bound to pay any other loſs than what ariſes from the ſtranding, becauſe it will hold out a temptation to ſtrand in many caſes. But whatever doubt might formerly have been entertained, the caſe of *Wilſon* v. *Smith* (*a*) has now put a judicial conſtruction upon the words "free from average, *unleſs general or the ſhip be ſtranded*;" which latter words the Court held were an exception, and not a condition, and that the aſſured was not entitled to recover a partial loſs on corn, becauſe there had alſo been a general average loſs incurred. It is no anſwer to ſay that that was not a caſe of ſtranding; becauſe the ſame conſtruction muſt neceſſarily be put on the ſecond as on the firſt branch of the exception: the term of connexion is the ſame, "unleſs general," or "unleſs the ſhip be ſtranded," and ſo Lord *Mansfield* expreſsly conſidered it in giving judgment; for he ſaid that "the inſurer is liable for all loſſes *ariſing from* the ſhip being ſtranded." "All other partial loſſes" he ſaid, "are excluded by the expreſs terms of the policy." And Mr. Juſtice *Buller* gave the ſame opinion in *Neſbitt* v. *Luſhington* (*b*). The loſs to be recovered (he ſaid) muſt be "a direct and immediate conſequence of the ſtranding." It is true that Lord *Kenyon* intimated a different opinion in that caſe; but it was without reference to the caſe of *Wilſon* v. *Smith*, the point not being in judgment before the Court. The caſe of *Cantillon* v. *The London Aſſurance Company* (*c*) proceeded upon the ground that the damage aroſe in conſequence of the ſtranding; for as the caſe is reported by

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(*a*) 3 *Burr.* 1550. (*b*) *Ante*, 4 vol. 788. (*c*) 3 *Burr.* 1553. and 2 *Mag.* 385.

by *Magens*, the jury conſidered it as a conſequence of her having been aground and becoming leaky, though it was not immediately perceived. That is more likely to be an accurate account of the caſe than the one mentioned by Sir *F. Norton* for the purpoſe of his own argument: and *Magens*'s own opinion of the meaning of the memorandum is deciſive in favour of the defendant. As to *Bowring* v. *Elmſlie*, the only queſtion was, whether the ſtranding were or were not fraudulent; and no evidence was offered to ſhew that the cargo was damaged by any other cauſe than the ſtranding; therefore this queſtion could never have ariſen.

Lord KENYON, Ch. J. We have had abundant opportunity of conſidering and re-conſidering this caſe: but I confeſs that, though my mind has at times been wavering, it at laſt reſts at the point where it firſt ſet out. When this queſtion aroſe and was judicially decided in 1754, I wiſh, if any doubt had then ariſen on the opinion which was then formed by a jury of merchants under the directions of Lord Ch. J. *Ryder*, that inſtead of ſilently acquieſcing in that deciſion, the defendant had reſiſted it by a motion for a new trial, or that all the underwriters had corrected the ambiguous terms of this memorandum. But that opinion was acquieſced in by the parties to that cauſe; and it appears that the great Inſurance Companies in *London* have ſince left out the words in the memorandum "unleſs the ſhip be ſtranded."

The words of this policy are in general terms, including all caſes: then comes this memorandum, "corn, fiſh, ſalt, fruit, flour, and ſeed warranted free from average, unleſs general or the ſhip be ſtranded." This therefore lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying that if the ſhip be ſtranded, then it deſtroys the exception and lets in the general words of the policy. If a general proviſion be made in any deed or inſtrument, and it is there ſaid that certain things ſhall be excepted unleſs another thing happen which gives effect to the general operation of the deed, if that other thing does happen it deſtroys the exception altogether. My two opinions that have been referred to, the one in the niſi prius caſe, and the other in *Neſbitt* v. *Luſhington*, have no weight with me as judicial authorities, though I confeſs I have not been able to extricate my mind from the reaſoning that led me to the concluſion in thoſe caſes. Without enquiring into the reaſons for introducing this exception, on the grammatical conſtruction of the whole

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whole I have no doubt. But let us alſo conſider ſome of the caſes decided on this ſubject. That of *Cantillon* v. *The London Aſſurance Company* I take from a better authority than that of *Magens*; I take it from *Burr. Rep.* as it was cited by Sir *F. Norton*, who being in poſſeſſion of a great portion of niſi prius buſineſs at that time was probably counſel in the cauſe, and who cited it in the preſence of many perſons who could have corrected him if he miſrepreſented it. Sir *F. Norton* ſtated that the ſhip *being ſtranded* (and not merely touching the ground as ſuppoſed by *Magens*) the inſured recovered an average loſs; for (he ſaid) Lord Ch. J. *Ryder* and a ſpecial jury conſidered it as a condition, "and that by the ſhip's being ſtranded the inſurer was let in to claim his whole partial average loſs." Now that is a judicial deciſion on the very point by a ſpecial jury of merchants under the directions of a learned judge, acquieſced in at the time by every perſon, and the great Aſſurance Companies in *London* altering the form of their policies in conſequence of it. Probably the private underwriters were aware of it; but they choſe to continue their policies in the old form in order to run away with the inſurance buſineſs from the great Companies; for if they did not intend to be anſwerable for ſuch a loſs, they would have altered the terms of this memorandum. Generally ſpeaking if I were bound to decide between the opinions of Lord *Mansfield* and Lord Ch. J. *Ryder*, perhaps I ſhould be guided by the former in preference to the latter: but what fell from him in the caſe of *Wilſon* v. *Smith* was only an obiter dictum; and I confeſs it does not bring conviction to my mind. With regard to *Cocking* v. *Fraſer*, it is ſufficient to ſay that there was no ſtranding in that caſe: what was there ſaid likewiſe was only an obiter dictum, and I cannot ſubſcribe to the opinion there given; it was there ſaid "if the commodity ſpecifically remains, the underwriter is diſcharged:" but if fiſh be deteriorated by the accident of ſtranding, I take it that the underwriters would be anſwerable though the article ſpecifically remained. It it had been intended that the underwriters ſhould only be anſwerable for the damage that ariſes in conſequence of the ſtranding, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid "unleſs for loſſes ariſing by ſtranding." But in the body of the policy they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is "free from average unleſs general, or

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or unleſs the ſhip be ſtranded;" ſo that if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and the grammatical conſtruction of the policy; and thinking ſo, I am bound to give the ſame opinion I formerly gave, not becauſe I gave that opinion before but becauſe I am convinced by the reaſoning that led to it.

ASHHURST, J. This memorandum is certainly couched in doubtful words; and that being the caſe, the beſt conſtruction that can be put on them is that which will prevent litigation. As it is difficult to determine, when the ſhip has been ſtranded, whether or not the damage to the cargo aroſe from the ſtranding, or how much of the damage was owing to that cauſe, it ſeems as if this memorandum were introduced to avoid that enquiry, and that when the ſhip has been ſtranded the underwriters conſent to aſcribe the loſs to that cauſe. This conſtruction will prevent endleſs litigation, and it has already been put on the memorandum in the caſes of *Cantillon* v. *The London Aſſurance Company*, and *Neſbitt* v. *Luſhington*; and ſo well ſatisfied were the great Aſſurance Companies with the former of thoſe determinations that they ſtruck theſe words "or the ſhip be ſtranded" out of their policies in conſequence of it. Then thoſe authorities having decided the point, there is now not only no reaſon to overſet them but a very ſtrong reaſon to induce us to ſupport them, namely, that this conſtruction of the policy will tend to prevent litigation.

GROSE, J. This is an action for a loſs by the perils of the ſeas, for which the defendant ſays that he is not anſwerable becauſe it is an average loſs on fruit, and that fruit is within the memorandum; but the plaintiff replies that this caſe is within the exception, becauſe the ſhip was ſtranded. And that brings it to the true conſtruction of the memorandum and of the exception to it, whether the underwriters be or be not liable for an average loſs when there is a ſtranding, though no part of the loſs ariſe from the ſtranding of the ſhip. I have had great difficulties in bringing my mind to decide this, becauſe the conſequence of conſidering this as an exception to the memorandum, as the words import, is this, that if a ſhip be ſtranded and the cargo ſuffers no damage whatever and afterwards the ſhip meets with bad weather and the cargo ſuſtains an average loſs of 90 *per cent.*, the underwriters are anſwerable for the whole of that average loſs

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when it is admitted that no part of it happened in conſequence of the ſtranding. Then it becomes neceſſary to conſider the words of the policy, the intention of the parties in introducing thoſe words, and the decided caſes. On the words no doubt can be raiſed; they are clear; the inſurers engage that certain articles, of which fruit is one, ſhall be free from average except in two caſes, one if it be a general average, the other if the ſhip be ſtranded: but if either of theſe happen, then thoſe articles are not to be free from average. Here the ſhip was ſtranded, and then according to the words this caſe comes within one of the exceptions. Next let us conſider the reaſon for introducing the exception: all the articles there enumerated are of a periſhable nature; and as it is difficult to aſcertain whether any damage happening to them aroſe from the ſtranding or from the periſhable nature of the articles, the parties ſeem to have agreed that there ſhall be no partial average unleſs the ſhip be ſtranded; that is, as was ſaid by Lord *Kenyon* in *Neſbitt* v. *Luſhington*, in order to avoid a difficult enquiry they agreed to conſider the loſs to have happened in conſequence of the ſtranding. If we were to determine that the aſſured could only recover for the loſs that happened by the ſtranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it ſeems to me beſt to decide this caſe on the plain import of the words, notwithſtanding the abſurdity which I at firſt pointed out will follow. Beſides if the parties had intended that the inſurers ſhould not be liable to the average loſs unleſs part of the loſs happened by the ſtranding, they would have added words to this effect "unleſs part of the loſs happen by the ſtranding;" and the omiſſion of ſuch words ſtrongly induces me to determine ſtrictly according to the words that are inſerted in the memorandum. However this caſe is not without a precedent. On examining the caſes that have been cited on both ſides, it appears that there is only one decided on the point, *Cantillon* v. *The London Aſſurance Company*; for with regard to that of *Wilſon* v. *Smith*, it is obſervable that the ſhip was not ſtranded there. But the caſe of *Cantillon* v. *The London Aſſurance Company* is the more to be relied on, becauſe the great Aſſurance Companies have acted upon it ever ſince. Therefore though I ſhould have had great doubts if the queſtion had never been determined, I think it is better to decide according to the words of the policy, eſpecially as that conſtruction is is ſupported by the above caſe, though it is open to the inconvenience to which I at firſt alluded.

LAWRENCE, J. Although the Jury found that part of the damage happened *after* the ſtranding, it is alſo found as a fact that the ſhip received no damage *in conſequence of the ſtranding*; and if the ſhip had not been ſtranded, both the ſhip and cargo would have been totally loſt. The queſtion therefore is, Whether an average loſs is payable to any amount, however great, from whatever cauſe the loſs may ariſe, if the ſhip happen to be ſtranded? Now conſidering how extremely inaccurate a policy of inſurance is penned, I think that too great ſtreſs ought not to be laid on the preciſe words uſed in it. If the exception in the memorandum be confined to loſſes ariſing from the ſtranding, it muſt be from this conſideration, that otherwiſe it would be a temptation to the maſter to ſtrand the ſhip, if any trifling damage were done to the cargo, to enable the aſſured to recover. On the other hand, if nothing can be recovered from the inſurers but for damage ariſing from the ſtranding, it would be the intereſt of the maſter to deſert the ſhip whenever a ſtranding happened, and then there would be a total loſs. However in a caſe where the words of the policy are inaccurate, and where there are inconveniences attending each conſtruction, if the caſe has ever been decided I think that we ought to be guided by it. In the caſe of *Wilſon* v. *Smith*, which was principally relied on for the defendant, Lord *Mansfield* ſeemed to conſider that the word "unleſs" did not create a condition; but that the meaning of the exception was that the underwriters ſhould only be liable for an average loſs in two caſes, one where there is a general average, the other where the damage ariſes from the ſtranding. But in ſo conſidering it Lord *Mansfield* went beyond the facts of the caſe then before the Court; for there the queſtion was, Whether the aſſured was entitled to recover a partial average from the circumſtance of his being entitled to recover a general average; now the words of the exception are not warranted free from average "unleſs *there be* a general average, or unleſs the ſhip be ſtranded;" but warranted free from average "unleſs general, or the ſhip be ſtranded;" therefore as there is a difference in the expreſſion of theſe two exceptions, perhaps it may be conſidered as a condition as applied to the ſtranding, though it be not a condition as applied to the general average. If ſo, then there is only one authority in point, that of *Cantillon* v. *The London Aſſurance Company*, in which caſe, according to the report of it in *Burrow*, it was conſidered that the ſtranding was a

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condition, and that the underwriters were liable on the happening of that condition. Therefore as the very queſtion has been once decided, I think it ought to govern our deciſion in this caſe, eſpecially as the queſtion ariſes on the conſtruction of an inſtrument ſo inaccurately penned as a policy of aſſurance.

Poſtea to the plaintiff.

Monday, May 15th.

Sharp *againſt* Sheriff.

The Court on the application of the defendant's bail granted a habeas corpus to the ſheriff of *H.* in whoſe cuſtody the defendant was under a charge of felony, to bring him up, in order that he might be ſurrendered by his bail. But the bail muſt firſt juſtify to entitle themſelves to make ſuch an application.

THE defendant was arreſted at the ſuit of the plaintiff on the 17th *February* laſt, and bail was put in; after which he was taken into cuſtody upon a charge of murder committed in *Ireland*, where a bill was found by the Grand Jury againſt him, and application had been made to the Secretary of State to ſend him over there in order to take his trial.

Garrow in this term obtained a rule calling on the plaintiff to ſhew cauſe why a writ of habeas corpus ſhould not iſſue to the ſheriff of *Hampſhire*, in whoſe cuſtody the defendant was, commanding him to bring up the defendant in order that his bail might ſurrender him, or to ſhew cauſe why an exoneretur ſhould not be entered on the bail-piece, or why proceedings ſhould not be ſtayed againſt the bail pending this enquiry. And he referred to *Wood* v. *Mitchell* (*a*), where the Court permitted an exoneretur to be entered on the bail-piece, becauſe the defendant being under ſentence of tranſportation for a felony, and actually on board a ſhip in the *Thames* ready to ſail, it would have been attended with great public inconvenience to bring him up. Alſo to *Merrick* v. *Vaucher* (*b*), and *Coles* v. *De Hayn* (*c*), where the ſame thing was done in reſpect of alien defendants removed out of the kingdom under the alien bill (*d*).

When the motion was firſt made the anſwer given was that the bail not having juſtified were not in a condition to make any motion; and on that ground the motion was delayed until the bail juſtified, when it was renewed.

Chambre now ſhewed cauſe. At all events that part of the rule for entering an exoneretur comes too early; for the ſame neceſſity does not exiſt here as in either of the caſes referred to. In the one, the defendant was actually under the judgment of the law as a felon and in execution of his ſentence. In the other the application was indeed made; but the Court refuſed it unleſs

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(*a*) *Ante*, 6 vol. 247. (*b*) *Ib.* 50. (*c*) *Ib.* 52. (*d*) 33 *Geo.* 3. *c.* 4.

the bail made an affidavit that they were not indemnified nor had any of the effects of the defendants in their hands. And finally in the laſt caſe it was refuſed; and the bail were afterwards held liable for the coſts of the trial, though it exceeded the (*a*) ſum for which they had got ſecurity. Then as to the firſt part of the rule for bringing up the defendant to be ſurrendered, it will give riſe to great danger and inconvenience: it will be uſed as an expedient to give felons in cuſtody at a diſtant part of the kingdom an opportunity of eſcaping; or at leaſt it may be practiſed to delay juſtice. Theſe conſiderations are of weight in a caſe where application is made to the diſcretion of the Court, and they were thought ſufficient in the caſe of *Fowler* v. *Dunn* (*b*) to induce the Court to reject the application under the ſame circumſtances as exiſted in *Wood* v. *Mitchell.*

Lord Kenyon, Ch. J. It is impoſſible at preſent to permit an exoneretur to be entered on the bail-piece: that part of the rule is at leaſt premature; we do not at preſent know that the defendant will be ſent out of the kingdom. But I cannot ſee any objection to the application for the habeas corpus to bring him up in order that his bail may ſurrender him. The undertaking of the bail is either to pay the debt or ſurrender the defendant; the defendant is ſtill in a condition to be ſurrendered; and the bail are deſirous to perform that part of their undertaking. There is no pretence therefore for the plaintiff to object to it; nor is there any reaſon why the bail ſhould be put in a worſe ſituation, becauſe the defendant is ſuppoſed to have committed a crime, againſt which they entered into no ſtipulation with the plaintiff. This does not appear to me to be an application to the favour of the Court, but is what the bail are entitled to aſk ex debito juſtitiæ; and as at preſent adviſed it ſeems to me to be almoſt a matter of courſe.

Chambre then offered to produce an affidavit, which he had, ſtating that the bail were indemnified. But by

The Court. That can make no difference; for if they are indemnified by the defendant himſelf, it may avail them nothing; and if by any other perſon, that will be only ſhifting the reſponſibility from one innocent perſon to another.

Rule abſolute for the habeas corpus.

The defendant was afterwards brought up and ſurrendered by his bail; when the Court committed him to *Newgate* upon the charge of felony.

(*a*) *Ante*, 6 vol. 246.

(*b*) 4 *Burr.* 2034.

Tueſday, May 16th.

GORDON and another Aſſignees of J. CAMERON a Bankrupt *againſt* The EAST INDIA Company.

Where *A*, a trader, and an officer in the *Eaſt India* Company's ſervice, aſſigned his privilege, conſiſting of ſhipping goods from the *Eaſt Indies* to *England*, to *B*, for a valuable conſideration, and in order to evade the bye laws of the *Eaſt India* Company, which prohibits ſuch aſſignment, the goods were ſhipped, entered, warehouſed, and ſold by the Company in *A.*'s name, and the proceeds carried to his account, but before *A.* received thoſe proceeds from the Company he became a bankrupt; held that his aſſignees were entitled to recover the amount in an action for money had and received againſt the *Eaſt India* Company, who retained the ſame; this being ſuch a poſſeſſion of "goods and "chattels" in the bankrupt as falls within the 21 *Jac.* 1. *c.* 19. *ſ.* 11.

To bring a caſe within that ſtatute the bankrupt muſt have been a trader when he was in poſſeſſion of the property.

THE plaintiffs declared in aſſumpſit for money had and received to the uſe of *Cameron* before his bankruptcy, and alſo for money had and received to the uſe of the plaintiffs his aſſignees ſince his bankruptcy. At the trial at the ſittings after laſt *Michaelmas* term at *Guildhall* the jury found a verdict for the plaintiffs for 664 *l.* 13 *s.* 8 *d.* ſubject to the opinion of this Court on the following caſe.

On the 22d of *November* 1793 *Cameron* was at *Calcutta* in the *Eaſt Indies* as chief officer of the ſhip called *Princeſs Amelia* in the ſervice of the *Eaſt India Company*, and a trader within the bankrupt laws; and being poſſeſſed of a ſum of 675 *l.* he applied to *J. Taylor* of that place to receive the ſame, and to give him a bill of exchange for the amount upon his correſpondents in *England*, which *Taylor* agreed to do upon *Cameron*'s permitting him to ſhip in his (*Cameron*'s) name and as his privilege ſix bales of piece goods the property of *Taylor*; which *Cameron* agreed to do. Thereupon *Taylor* gave *Cameron* a bill of exchange for 675 *l.* thus; "*Dacca* 23d *November* 1793. For 675 *l.* ſterling, twenty days after the final adjuſtment at the *Eaſt India* Houſe of the account, private trade of Mr. *J. Cameron* chief officer of the Company's ſhip the *Princeſs Amelia*, in which are comprized ſix bales of goods containing 395 pieces, the ſame being delivered in good condition, pleaſe to pay this my firſt of exchange (ſecond and third of the ſame tenor and date not being paid) to the order of the ſaid *J. Cameron* the ſum of 675 *l.* ſterling, value received, and place the ſame to the account as per advice, &c." Addreſſed to "Sir *Henry Fletcher*, Bart. *Evan Law*, *Edward Golding*, *William Taylor* Eſqs. *London*." In purſuance of the above agreement *Taylor* ſhipped ſix bales of goods his property on board the ſaid ſhip, in the name and as the privilege of *Cameron*. *Cameron* by a deed poll under his hand and ſeal dated 22d *November* 1793 aſſigned to *Taylor* the ſaid ſix bales to hold the ſame and the produce thereof to *Taylor* his executors &c, to the uſe of *Cameron* until the acceptance of the ſaid bill of ex-

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change and after the acceptance thereof then to the uſe of *Taylor* his executors &c. In the deed poll there was a covenant on the part of *Cameron* under the penalty of 800*l.* to tranſport and convey the goods to *London* on board the ſhip the *Princeſs Amelia*, and there with all convenient ſpeed after the arrival of the ſhip to deliver the ſame into the Company's warehouſes, to be ſold at their ſale at the riſk and on the account of *Taylor*. The aſſignment alſo contained a power of attorney from *Cameron* authorizing Sir *Henry Fletcher* &c. for the ſole uſe and benefit of *Taylor* to receive from the *Eaſt India* Company the money ariſing by the ſale of the ſix bales, and to give receipts for the ſame as in ſuch caſes is uſual. The ſix bales of goods arrived in *England* in the ſhip *Princeſs Amelia*, *Cameron* during ſuch voyage being chief officer thereof, and were delivered into the *Eaſt India* Company's warehouſe as part of the privilege of *Cameron*, and were ſold as ſuch in *September* and *October* 1794 at the Company's ſales of private trade; they produced the net ſum of 664*l.* 13*s.* 8*d.* which ſum was placed to the credit of *Cameron*, and now remains in the hands of the Company. The bill of exchange given by *Taylor* for the purchaſe of the goods was duly accepted, and was indorſed and paid away by *J. Cameron* to Mr. *E. Cameron* before the bankruptcy of the former; but has been refuſed payment by the acceptor *W. Taylor* in conſequence of the proceeds of the goods not having been paid to him. *Cameron* became a bankrupt in *November* 1794, and on the 27th of that month a commiſſion of bankrupt was duly iſſued againſt him upon the petition of *J. Cameron*, who was a creditor of *Cameron*'s to the amount of 100*l.* before and at the time of his committing the act of bankruptcy upon which the commiſſion was founded, and who continued ſo to be until the ſuing out of the commiſſion. The plaintiffs were choſen aſſignees of his eſtate &c. *William Taylor* applied on 5th *January* 1795 at the proper office at the *India Houſe* for an account of the ſale of the goods, and claimed to receive the ſame under the ſaid aſſignment and letter of attorney; but the meſſenger under the commiſſion of bankrupt againſt *Cameron* having in *November* 1794 given notice to the *Eaſt India* Company of ſuch bankruptcy, they refuſed to account and pay for the goods to *W. Taylor*. *W. Taylor* could not have got the produce of the goods from the *Eaſt India* Company before *January* 1795; nor could any alteration have been made in the

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ſhip's books, or at the *India Houſe*, before the bankruptcy, as to the name of the perſon on whoſe account the goods were ſhipped, received, warehouſed, and ſold. The *India* Company never pay the produce of the goods which have been aſſigned without a power of attorney from the aſſignor, authoriſing the perſon ſo appointed to receive the ſame; and if the party aſſigning die or become bankrupt, the Company do not afterwards pay to ſuch aſſignee without being indemnified. The officers of the *Eaſt India* Company do notwithſtanding the prohibitory orders of the Company frequently aſſign the benefit of their privilege by aſſignments ſimilar to that made by the bankrupt in the preſent caſe. Theſe orders were read on the trial, intitled "The indulgence of "private trade from the United Company of Merchants of *Eng-* "*land* trading to the *Eaſt Indies* to the commanders and officers "of their freighted ſhips," which after ſtating the tonnage and other privileges allowed to the officers of the *India* ſhips, were to the effect following; "the above tonnage and other allowances are to be for the proper uſe and account of the aforeſaid perſons; and they are not on any conſideration allowed to diſpoſe of their own or make uſe of the privilege of any other perſon whatſoever, unleſs the Court ſhall at any time think proper to diſpenſe with the ſame." "The commanders and officers ſhall be at liberty to pay any part of the produce of their outward bound adventure into the Company's caſh in *India*, for which they ſhall have certificates granted to them on the Court of Directors at the uſual rates of exchange not exceeding 5000*l.* ſterling during the courſe of the voyage, to be divided among them in the ſame proportions as are now ſettled in reſpect to their private trade outwards (*a*)."

Giles for the plaintiff. The 21 *Jac.* 1. *c.* 19. attaches upon this property as being in the poſſeſſion of the bankrupt at the time of the act of bankruptcy. By *ſ.* 11. of that ſtatute "if "any perſon or perſons ſhall become bankrupt, and at ſuch time "ſhall by the conſent of the true owner and proprietor have in "their poſſeſſion order and diſpoſition any *goods or chattels* "whereof they ſhall be reputed owners, and take upon them the

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(*a*) The caſe was firſt ſtated defectively in not ſhewing that the bankrupt was a trader at the time when the goods were in his poſſeſſion, which the Court thought neceſſary in order to give riſe to the queſtion between the parties. But the fact being admitted to be ſo, it was agreed that the ſtate of the caſe ſhould be altered in that reſpect, and the fact introduced.

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“ ſale alteration or diſpoſition as owners,” the commiſſioners may ſell and diſpoſe of the ſame for the benefit of the creditors. Without minutely examining the various caſes that have been determined on this ſtatute, it is ſufficient to ſay that they are reſolvable into three claſſes; 1ſt, Where the bankrupt being the original owner of goods has transferred the property to another but retained the poſſeſſion, there the property has been holden to go to the aſſignees; except in particular caſes where an actual delivery of it at the time was impoſſible, but a ſymbolical delivery was made. The ſecond claſs is where the owner has placed property in the hands of the bankrupt for ſome ſpecific purpoſe, as to repair or work it up, to ſell it as a factor, or the like; in which caſes the property has been holden not to paſs to the aſſignees, becauſe it was not in the bankrupt's poſſeſſion as his own. Thirdly, where the property has been placed in the bankrupt's hands by another in ſuch a manner and under ſuch circumſtances as to make it appear to the world in general that he was the true owner of it, whereby he gains a falſe credit; within which claſs the preſent caſe falls. The principal object of the act, as Lord *Hardwicke* ſays in *Ryall* v. *Rowles* (*a*), was to prevent traders gaining a deluſive credit by a falſe appearance of ſubſtance to miſlead thoſe who ſhould deal with them. It was once indeed a queſtion whether the preamble did not reſtrain the enacting part, and confine it's operation to a poſſeſſion of the goods which had originally belonged to the bankrupt and were retained by him after a conveyance to another. But it was finally ſettled in *Mace* v. *Cadell* (*b*) that it did not, but that it extends to the goods of other perſons in the hands of the bankrupt. The only queſtion therefore is what ſort of control or poſſeſſion will amount to a reputed ownerſhip within the meaning of the ſtatute. It muſt be ſomething ſhort of the *real* ownerſhip, becauſe the word *reputed* is uſed in contradiſtinction to it; that is, according to Lord *Hardwicke* in *Ryall* v. *Rowles*, where a perſon by ſpecious acts of poſſeſſion order and diſpoſition gives himſelf an appearance of property which he really has not. And accordingly the caſes have gone on that ground, that where the appearance of ownerſhip in the trader was ſuch as to impoſe on the world, the ſtatute has attached on the property ſo placed in his hands. Such was the caſe in *Mace* v. *Cadell*, where the property was adjudged

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(*a*) 1 *Vez.* 372.

(*b*) *Cowp.* 232.

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to belong to the reputed huſband in whoſe name a public houſe was kept, though in truth it belonged to the plaintiff his ſuppoſed wife. So here, to all appearance theſe goods were the property of *Cameron*; they were ſhipped, entered, warehouſed, and ſold, in his name, and the proceeds carried to his account by the *Eaſt India* Company. No dominion could be apparently more complete than his; he had the ſale and diſpoſition of it apparently for his own benefit. This accords alſo with the very object of the parties, which was to impoſe on the *Eaſt India* Company, and induce them to believe that the property was *Cameron*'s: but they could not impoſe upon the Company without alſo impoſing on the reſt of the world; and that very circumſtance brings the caſe within the ſtatute. It cannot now be objected that the produce in the hands of the Company does not come within the words of the ſtatute; becauſe it was holden in *Ryall* v. *Rowles* (*a*) that choſes in action fall within the deſcription of *chattels* there mentioned; and the produce of goods muſt be conſidered in the ſame ſituation as if the goods themſelves had remained in ſpecie. Nor can it be objected that no delivery could be made after the ſale of the goods; for this may be conſidered as a book debt; and in the caſe laſt mentioned it was held that in order to make good an aſſignment of ſuch a choſe in action, as far as might be, it was neceſſary to give notice to the debtor; but here no notice was given at the time to the *Eaſt India* Company; and therefore the parties did not do every thing which they might have done to render the transfer notorious.

Lawes contrà. The property paſſed from the bankrupt to *Taylor* upon a good conſideration in the firſt inſtance; and there has been no failure of that conſideration ſince. It was not in the contemplation of either of the contracting parties to commit a fraud upon the bankrupt's creditors, but merely to contravene a private bye-law of the *Eaſt India* Company; and as the Company themſelves do not complain of that, no other perſon has a right ſo to do. Nor indeed does it appear that *Cameron* had any creditors at the time when the tranſaction took place; though it is ſtated that he was then a trader. The caſe therefore comes merely to a queſtion of conſtruction upon the ſtatute of *James*. The miſchief which that act was intended to remedy was certainly great; but the remedy being very penal the Courts have always required the caſe to be brought ſtrictly within it. For which pur-

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(*a*) 1 *Vez.* 372. and 1 *Atk.* 177.

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poſe theſe things are neceſſary to be ſhewn; namely, a fraudulent poſſeſſion in the bankrupt manifeſted by ſome act of notoriety, accompanied with a power of diſpoſition; the property alſo muſt be of that particular ſpecies deſcribed in the ſtatute; and it muſt be in his poſſeſſion at the time of the bankruptcy. As to the fact of poſſeſſion, it ſhould ſeem that the preſumption of property rather ariſes from the actual than the conſtructive poſſeſſion of goods. Here the actual poſſeſſion was firſt in the captain of the ſhip on board of which the goods were, and afterwards in that of the *Eaſt India* Company; the bankrupt never had the actual poſſeſſion. But admitting a conſtructive poſſeſſion to be ſufficient, yet the preſumption of property cannot ariſe from that alone, unaccompanied by notorious acts of ownerſhip. But poſſeſſion, whether actual or conſtructive, is only an equivocal circumſtance, capable of explanation, either, firſt, by ſhewing that it was unavoidable, as in the caſe of a ſhip at ſea, of which no delivery can be made; and therefore the delivery of the grand bill of ſale is held ſufficient. *Atkinſon* v. *Maling*, *ante*, 2 vol. 462; or as where the property was too bulky for delivery, *Manton* v. *Moore*, *ante* 67. 2dly. Where the bankrupt has a poſſeſſion for ſome ſpecial purpoſe; as in *Collins* v. *Forbes*, *ante*, 3 vol. 316. 3dly. Where his poſſeſſion is conſiſtent with the deed under which the property is transferred to another, as in *Cadogan* v. *Kennett*, *Cowp.* 432. *Jarman* v. *Woolloton*, *ante*, 3 vol. 618. and other caſes of the ſame deſcription. 4thly. Where the poſſeſſion of the bankrupt is uſual or cuſtomary, though the property is in another; and therefore ſuch poſſeſſion cannot have the effect of deceiving others or inducing them to give a falſe credit, as in *Atkinſon* v. *Maling*, *ante*, 2 vol. 462. Now this caſe comes within all theſe exceptions; for here the bankrupt's poſſeſſion was unavoidable; becauſe in no other name could the goods have been brought home; it was alſo for the ſpecial purpoſe of tranſporting the goods to *England*, and diſpoſing of them at the Company's ſales; it was conſiſtent with the terms of the contract, without which it could not have been executed; and it was alſo uſual and cuſtomary, and could not from the nature of the thing induce a falſe credit to be given to the bankrupt, his poſſeſſion being purely conſtructive. And where there is a lien on the goods, as there was in this caſe, the creditors cannot be in a better ſituation than the bankrupt. *Falkener* v. *Caſe*, 1 *Bro. Ch. Ca.* 125.

Lord KENYON, Ch. J. The caſes cited and relied upon by the defendant will not be ſhaken by a deciſion againſt him in this caſe,

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There is no doubt but that ſhips at ſea may be transferred by the delivery of the grand bill of ſale, or that goods at ſea may be aſſigned by a delivery of the bill of lading. The caſes, in which it has been holden that the perſonal chattels of the wife may be ſettled in truſtees, will alſo remain in force. How the queſtion as to this laſt claſs of caſes would be now determined, if it were res integra, I will not preſume to ſay: I lament that it ever was decided that the poſſeſſion and apparent ownerſhip of perſonal property may be in one perſon and the title to it in another; for I think it would have been better for the public if the poſſeſſion of ſuch property (except in the caſe of factors) were to carry the title with it. The caſe of real property is in a different ſituation; no purchaſer is ſatisfied with the mere poſſeſſion of an eſtate; before he purchaſes he calls for the title deeds and examines whether or not the poſſeſſor be entitled to the eſtate. But the poſſeſſion of perſonal property is generally the title on which the world relies.

The ſtatute of *James*, on which the preſent queſtion ariſes, appears to me to be a wiſe regulation. It was paſſed when the commercial intereſts of this country were extremely well underſtood, and in a reign when as many wiſe proviſions were made for regulating both the internal and external trade of the country as were ever made in any equal number of years. And in my opinion every act of parliament that tends to prevent fraud ought to receive an extenſive conſtruction and not to be frittered away. Now let us ſee what this caſe is; *Cameron*, who was the firſt mate of an *Eaſt India* ſhip, had by the indulgence of the *Eaſt India* Company the privilege of ſending goods in their ſhip to a certain amount; by the private regulations of the *Eaſt India* Company theſe privileges are only to be for the proper uſe of the reſpective officers, and never to be diſpoſed of unleſs the Company give ſpecial leave for that purpoſe; it appears alſo that *Taylor* ſhipped theſe goods in *Cameron*'s name and as his privilege; that they were entered in the *Eaſt India* Company's books as *Cameron*'s, and ſold as his; it further appears that *Taylor* never could have got poſſeſſion of theſe goods until *January* 1795, and that no alteration as to the name of the owner of the goods could have been made either in the ſhip's books or at the *India Houſe* before *Cameron*'s bankruptcy. Now in this caſe there were no documents which *Taylor* could have carried to market for the purpoſe of transferring this property, as in the caſe of bills of lading:

lading: but the actual property was in *Cameron* one of the officers on board this ſhip; and all the evidence of title, on examining the Company's books, ſhewed that the property was in *Cameron*. And the queſtion now is, Whether or not this be a caſe within the ſtatute 21 *Jac.* 1. *c.* 20? If it be not, I really do not know what caſe does come within it. That ſtatute meant that creditors ſhould not be deluded by falſe appearances. In this caſe falſe appearances were held out to *Cameron*'s creditors; if they had made any enquiries at the ſhip reſpecting the title to theſe goods, it would there have appeared that they were entered as part of *Cameron*'s privilege and in his name; if application had been made to the *Eaſt India* Company, they would have been informed that the goods were *Cameron*'s, becauſe no other perſon had a right to put goods on board under the head of *Cameron*'s privilege; if they had enquired at the time of the ſale, the anſwer would ſtill have been the ſame. Suppoſe *Cameron* had been deſirous of raiſing money on the credit of theſe goods, the perſon advancing the money would reaſonably have concluded that they were the property of *Cameron* becauſe they were entered in his name. In ſhort, in whatever light this is conſidered, the whole is deluſion. The parties examining into *Cameron*'s right could only have concluded that the goods were his property: whereas if the defendants' argument were to prevail, thoſe who truſted to theſe appearances would be deluded by finding that another perſon was the owner by means of a ſecret tranſaction between *Cameron* and *Taylor*. Then it was ſaid that all this tranſaction was fair: as between *Taylor* and *Cameron* it may be ſo; but as between *Cameron* and his creditors it is not fair, but deluſion. Therefore it appears to me that *Cameron* had the poſſeſſion order and diſpoſition of theſe goods within the meaning of the ſtatute and within the caſe of *Ryall* v. *Rowles*, in which it was decided that choſes in action were *goods and chattels* within that act. If we were to give effect to *Taylor*'s demand in this caſe, we ſhould defeat all the proviſions of this act of parliament, which ought rather to be extended in its conſtruction than controlled.

ASHHURST, J. This caſe appears to me to come directly within the words and meaning of the ſtatute of *James*, the object of which was to prevent perſons in trade obtaining falſe credit by the poſſeſſion and apparent ownerſhip of goods not their own, and thereby deluding their creditors. Under theſe circumſtances any perſon would have advanced money to *Cameron* on the credit of theſe

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goods, he being the oſtenſible owner of them. This is a very beneficial act of parliament; and though individuals may in ſome inſtances ſuffer by it, the benefit which the public derive from it infinitely outweighs ſuch private inconveniences.

Grose, J. It is always unfortunate when the goods of one perſon are taken to pay the debt of another. By this act of parliament if a trader has in his poſſeſſion the goods of another perſon with the conſent of that other, and has the order and diſpoſition of them, and the trader becomes a bankrupt, his commiſſioners may diſpoſe of them for the benefit of his creditors. But this act was paſſed in order to prevent a trader's obtaining a falſe and deluſive credit by the poſſeſſion of the goods of another; and if by having ſuch poſſeſſion the trader gain a falſe credit, the goods are to be diſtributed under this act to thoſe who may be ſuppoſed to have given him credit. Now this caſe comes both within the words and meaning of this act of parliament. *Cameron* was the reputed owner of the goods, otherwiſe they could not have been brought to *England* in this manner, for they were brought here as part of his privilege; he had the order and diſpoſition of them; they were carried to the *Eaſt India* Company's warehouſe and entered in their books as his property, and ſold as his, no notice having been given to any perſon before the bankruptcy that the goods were not the property of *Cameron*; and the queſtion is, Who is entitled to the produce of them? Under this act of parliament the commiſſioners are entitled to diſpoſe of it for the benefit of *Cameron*'s creditors. Then it was argued that the money in the *Eaſt India* Company's hands was not the ſpecies of property that this ſtatute had in view: but it is a choſe in action, and it was determined in *Ryall* v. *Rowles* that a choſe in action is within the proviſions of the act.

Lawrence, J. It ſeems to me that the aſſignees are entitled to recover the produce of theſe goods on this ground, that *Taylor* cannot have a better title than he would have, if the colour which was given to this tranſaction were true. Now ſuppoſing theſe really had been the goods of *Cameron*, and he had agreed to aſſign them to *Taylor* on their arrival here, and on *Taylor*'s accepting a bill of exchange; on the arrival of the goods and acceptance of the bill by *Taylor*, *Cameron* ſhould have transferred them to *Taylor* or to his aſſignee; after ſuch transfer *Taylor* or his agents ſhould either have taken actual poſſeſſion of the goods or given notice that they were his property, otherwiſe he enabled *Cameron* to have the apparent

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apparent ownerſhip of the goods. When theſe goods were ſold at the *Eaſt India* Company's ſale, the money was received by the Company to the uſe of *Cameron;* in which caſe, according to *Ryall* v. *Rowles*, in order to aſſign a choſe in action ſo as to take the caſe out of the ſtatute, notice ſhould have been given to the *Eaſt India* Company. But no ſuch notice was given, and for want of it *Taylor* gave *Cameron* an opportunity of defrauding other perſons by the oſtenſible ownerſhip of the goods. It was ſaid indeed that, even if notice had been given, the *Eaſt India* Company would not have ſuffered any alteration to be made in their books before *Cameron* became a bankrupt: but that is immaterial as far as reſpects this caſe; notice might have been given notwithſtanding, and the effect of it would have been to prevent any perſons who enquired at the *Eaſt India-Houſe* into the title of theſe goods being defrauded, becauſe there they would have been informed that the goods were not the property of *Cameron*, though they were entered as his in their books. Such notice therefore might have prevented the very fraud againſt which the act of parliament intended to guard. But two caſes have been much relied on, *Collins* v. *Forbes*, and *Falkener* v. *Caſe*. With regard to the former, I was by no means ſatisfied with the deciſion; it ſtruck me that, when the timber was delivered to the officers of government in *Kent*'s name and for his uſe, he had the poſſeſſion and order and diſpoſition of it: but the Court proceeded on this ground that the bankrupt had only the poſſeſſion of the goods for a ſpecial purpoſe, and had not the order and diſpoſition of them. But that is not the caſe here; it is not pretended that *Cameron* had not the order and diſpoſition as well as the poſſeſſion of theſe goods. And as to *Falkener* v. *Caſe*, it was clear that the policy was not in the bankrupt's poſſeſſion, for he had pawned it to the broker; and therefore that was not a caſe within the ſtatute 21 *Jac.* 1. So that neither of thoſe two caſes militates againſt our deciſion in this caſe.

Poſtea to the plaintiffs.

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Wedneſday, May 16th.

The KING *againſt* J. A. HARRIS.

If a conviction do not ſtate an adjudication, it cannot be ſupported, whether the puniſhment be or be not fixed by ſtatute. Whether the ſtat. 1 *Jac.* 1. *c.* 27. be repealed by the ſtat. 22 & 23 *Car.* 2. *c.* 25.? *Qu.*

THIS was a conviction on the ſtat. 1 *Jac.* 1. *c.* 27. for killing two hares with a gun. The conviction, after ſetting forth the information, ſummons, plea, and the evidence, concluded thus, "Whereupon all and ſingular the premiſes being ſeen and fully underſtood &c, it appears to us the ſaid juſtices that the ſaid *J. A. Harris* is guilty of the offence charged upon him in and by the ſaid information; and thereupon it is conſidered and adjudged by us the ſaid juſtices that the ſaid *J. A. Harris* be convicted and he is hereby convicted by us the ſaid juſtices by the teſtimony of &c, of the offence charged upon him in and by the ſaid information according to the form of the ſtatute in ſuch caſe made and provided." By the ſtatute 1 *Jac.* 1. *c.* 27. *ſ.* 2. it is enacted that every perſon who ſhall ſhoot at kill or deſtroy with any gun &c any hare &c (the ſame being proved &c before two juſtices &c) ſhall be by the ſaid juſtices committed to the common gaol of the ſaid county &c for three months unleſs the offender forthwith upon conviction pay to the churchwardens of the pariſh where the offence is committed or the party apprehended to the uſe of the poor of the ſaid pariſh the ſum of 20 *s.* for every hare &c.

Erſkine, on behalf of the defendant, propoſed to take ſeveral objections; 1ſt. That the ſtat. 1 *Jac.* 1. *c.* 27. was in this reſpect virtually repealed by the ſtat. 22 & 23 *Car.* 2. *c.* 25.

On a queſtion being then put by the Court, Whether the conviction were not informal for want of an adjudication,

Garrow, who was to have argued in ſupport of the conviction, admitted that this objection was deciſive; on which

Lord KENYON, Ch. J. ſaid, Without agitating the queſtion reſpecting the repeal of the ſtatute of *James*, which need not be diſcuſſed in this caſe, I am clearly of opinion that the conviction cannot be ſupported for want of an adjudication. Before the caſe of *R.* v. *Vipont* (*a*) there had been determinations both ways; but in that caſe it was clearly ſettled that this was a fatal objection. I have rather a fuller manuſcript of that caſe than is to be found in *Burrow's Reports*; and according to that *Wilmot* J. ſaid "The other objection, for want of an adjudication, is ſtill more material. A conviction is in the nature of a verdict and judgment, and therefore it muſt be preciſe and certain. And notwithſtanding

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(*a*) 2 *Burr.* 1163.

ing ſome old caſes in *Salkeld* (*a*) and in other books to the contrary, I take it that the judgment is an eſſential point in every conviction, let the puniſhment be fixed or not. And ſo it was held in *R.* v. *Hawkes* (*b*) on a conviction for deer-ſtealing, though the penalty there was fixed at 50*l.* certain; and in that caſe Mr. *Fazakerly* cited two caſes to the ſame effect. This matter alſo came before the Court in *Tr.* 9 *Geo.* 1. on a conviction on the ſtat. 1 *Geo.* 1. *c.* 48.; and there the conviction was only *ideo conſideratum eſt quod convictus eſt &c*; and though that point was not there decided, it appears to have been the ſenſe of the Court that the conviction was bad for that reaſon. That caſe is reported in Modern Caſes in Law and Equity (*c*): but it is totally miſtaken there, as indeed are nine caſes out of ten in that book." Therefore, without conſidering the other point concerning the virtual repeal of the ſtatute of *James* which I deſire to leave untouched, I am clearly of opinion that this conviction cannot be ſupported for want of an adjudication.

Per Curiam Conviction quaſhed (*d*).

(*a*) *Vid. R.* v. *Chandler, Salk.* 378.

(*b*) *Vid.* 2 *Str.* 858.

(*c*) *Vid. R.* v. *Aſhton,* 8 *Mod.* 175.

(*d*) Another conviction againſt the ſame defendant was alſo quaſhed for the ſame objection. See alſo *R.* v. *A. Hall, Cowp.* 60; and *R.* v. *Dimpſey, ante* 2 vol. 96.

The King *againſt* The Sheriff of Surry.

Wedneſday, *May* 16th.

Upon an application to ſet aſide an attachment againſt the ſheriff for not bringing in the body, bail having been put in and no trial loſt, the Court require an affidavit of merits if ſuch application come from the defendant in the cauſe, but not if it come *bonâ fide* from the ſheriff himſelf, of which fact he muſt make oath. But where ſuch attachment has regularly iſſued, the Court will on no account relieve the ſheriff, if it appear that he let the defendant out of cuſtody without taking from him ſuch a bail-bond as is required by the ſtatute.

A Rule had been obtained calling upon the plaintiff in a cauſe of "*Baker* v. *Alderman*" to ſhew cauſe why the attachment which had regularly iſſued againſt the ſheriff for not bringing in the body ſhould not be ſet aſide upon payment of coſts, bail having been put in, and no trial having been loſt.

Reader ſhewed cauſe; and inſiſted on the want of an affidavit of merits, which he ſaid was neceſſary to entitle the defendant in the cauſe to ſet aſide the attachment; for which he cited a caſe from the maſter's notes of the *King* v. the Sheriff of *Surry*, in a cauſe of *Brooke* and others v. *Woolley*, in *Eaſter* Term laſt; when ſuch an affidavit on the part of the defendant applying was

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holden to be neceſſary. And he ſuggeſted that this application, though in the name of the ſheriff, was in truth made on the part of the defendant.

Beſt, in ſupport of the rule, denied that the ſheriff was lending his name to the defendant in the original action, but was merely endeavouring to relieve himſelf from a reſponſibility which he had incurred by his omiſſion. He ſaid that it was prepoſterous to call on the ſheriff to make an affidavit of merits, of which he muſt be ignorant: and he cited *Hill* v. *Bott* (*a*), where the Court held under the ſame circumſtances that the attachment ought to be ſet aſide, as the plaintiff was put in the ſame ſituation that he was originally entitled to be in.

Reader obſerved that it did not appear that there was not an affidavit of merits in that caſe, though that not being immediately in queſtion it was not noticed in the report of the caſe.

Lord Kenyon, Ch. J. Where the application is really made on behalf of the ſheriff, it cannot be expected that he ſhould make an affidavit of merits; though if it were an application on behalf of the defendant himſelf, we ſhould certainly require ſuch an affidavit. But to prevent colluſion in the preſent or any future caſe of this kind, we ſhall require an affidavit to be made on the part of the ſheriff that this application originated from him, and was not made in colluſion with the defendant in the cauſe; and if that be done, the plaintiff will have no reaſon to complain, as he will be put in the ſame ſituation that he was originally entitled to be in.

The matter ſtood over for the affidavit to be received from the ſheriff, which was accordingly produced and read on a ſubſequent day: but it appearing there that the ſheriff had diſcharged the defendant out of his cuſtody on his own undertaking to appear and put in bail, and had neglected to take ſuch a bail-bond as is required by the ſtatute,

The Court, on this objection being taken, and on conſideration of the caſe of *Fuller* v. *Preſt* (*b*), refuſed to relieve the ſheriff who had been thus guilty of a breach of his duty; and therefore

Diſcharged the rule.

(*a*) *Ante* 4 vol. 352.

(*b*) *Ante* 109.

Wedneſday, May 17th.

ALVES *againſt* HODGSON.

The plaintiff cannot recover upon a written contract made in *Jamaica* which by the laws of that iſland was void for want of a ſtamp.

THE declaration ſtated that on 25th *July* 1796 at *Jamaica*, viz. at *London* &c. in conſideration that the plaintiff at the requeſt of the defendant would enter himſelf as a mariner on board the ſhip *Neill Malcolm*, whereof the defendant was then maſter, and bound on a voyage from *Jamaica* to *London*, and would proceed on the voyage as ſuch mariner, and would do his duty as an able ſeaman, the defendant undertook and to the plaintiff promiſed three days after the arrival of the ſaid ſhip *Neill Malcolm* at *London* to pay him as ſuch mariner fifty guineas as wages for his ſervice during the voyage. It then ſtated that the plaintiff on the ſame day &c entered on board the ſaid ſhip as a mariner to ſerve during the voyage, and that he did accordingly ſerve and do his duty on board the ſame until the 29th *July* 1796, at which time the ſhip was on the high ſeas; and although the plaintiff was ready and willing and offered to remain and ſerve on board the veſſel &c for the reſidue of the voyage, yet the defendant contriving and intending to injure the plaintiff would not permit him to remain on board the veſſel, but without any reaſonable cauſe and againſt the conſent of the plaintiff diſcharged him from his ſervice as ſuch mariner, and obliged him to quit the veſſel. It then ſtated the ſubſequent arrival of the ſhip at *London* &c and the refuſal of the defendant to pay the plaintiff his wages; and that in conſequence of ſuch diſmiſſal of the plaintiff from the veſſel he had loſt the advantage which would otherwiſe have accrued to him from ſerving on board during the remainder of the voyage. The ſecond count ſtated that in conſideration that the plaintiff at the requeſt of the defendant had entered himſelf as a mariner on board the ſaid veſſel on the ſame voyage the defendant made his certain note in writing ſubſcribed with his hand, and thereby three days after the arrival of the ſaid ſhip *Neill Malcolm* at *London* promiſed to pay the plaintiff by the name of *William Alves* the ſum of fifty guineas if the plaintiff did his duty as an able ſeaman: it then ſtated that the plaintiff did accordingly enter, and all the other facts mentioned in the firſt count. There were other counts for work and labour, upon a quantum meruit, and upon an account ſtated.

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ALVES *againſt* HODGSON.

At the trial before Lord *Kenyon* at the ſittings after laſt term at *Guildhall* the plaintiff proved the facts as ſtated in the declaration, and produced the note mentioned in the ſecond count, which was dated "*Jamaica* 25th *July* 1796," and was in theſe words; "three days after the arrival of the ſhip *Neill Malcolm* at *London* "I promiſe to pay to *W. Alves* fifty guineas, if he does his duty "as an able ſeaman;" ſigned "*John Hodgſon.*" There was no ſtamp on the paper, and the defendant gave in evidence a law of *Jamaica* paſſed before the date of the note, whereby a certain ſtamp was impoſed on all inland bills of exchange and on all promiſory and other notes (*a*); and contended that the paper in queſtion not being ſtamped was void by the operation of that law, and not being evidence in the country where it was made it could not be received in evidence in a court of juſtice here. And Lord *Kenyon* being of that opinion, a verdict was taken for the plaintiff generally, with leave to the defendant to move to enter a nonſuit on that ground. Accordingly *Mingay* on a former day having obtained a rule for that purpoſe,

Garrow and *Eſpinaſſe* now ſhewed cauſe againſt it. 1ſt, The paper given in evidence was not a promiſory note but an agreement, and therefore not within the ſcope of the law of *Jamaica*. By that agreement the plaintiff undertook for his good conduct as a ſailor during the voyage, and the captain in conſideration thereof undertook to pay him fifty guineas for his labour. In *Carlos* v. *Fancourt* in error (*b*), the Court held that a promiſe in writing to pay money on a contingency could not be declared on as a promiſory note within the 3 & 4 *Ann.* *c.* 9. becauſe it was not a negotiable inſtrument; but they alſo held that it might be declared on as a ſpecial agreement; and accordingly the declaration in this caſe is ſo framed. But 2dly, if the Court ſhould hold this to be a promiſory note within the law in queſtion, ſtill they will not ſuffer the defendant to avail himſelf of an objection which is merely founded on a revenue law in a foreign country, and does not enter into the merits of the tranſaction between the parties. The operation of ſuch a law is merely local, and has never been holden proper to be

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(*a*) The law in queſtion impoſed a ſtamp duty on "every piece or ſheet of paper &c "on which ſhall be written any inland bill "of exchange draft or order &c promiſory "or other note, where the ſum or value "expreſſed therein or made payable thereby ſhall be above 20 *l.* and not exceeding 50 *l.*, the ſum of 1 *s.* 3 *d.* when the "ſum ſhall be above 50 *l.* and not exceeding 200 *l.*, the ſum of 1 *s.* 8 *d.* &c."

(*b*) *Ante*, 5 vol. 482.

enforced by a foreign judicature (*a*). Beſides, 3dly, There is a count on a quantum meruit; and if the paper could not be received as evidence of the ſpecial undertaking, then the plaintiff was at liberty to prove his actual ſervice for five days on board the ſhip, and to recover for the value of his labour during that time, as it was proved that he did not deſert his duty, but was forced out of the ſhip by the defendant's contrivance.

Mingay, *contrà*, inſiſted that the contract was entire, and unleſs the plaintiff was entitled to recover for the whole he could not recover at all. In going upon the count for the quantum meruit, he will be eſtopped by the defendant's ſhewing that there was a contract in writing. It was never known that where a contract being illegally framed cannot be enforced as ſuch, the plaintiff can avail himſelf of the execution of part of it to recover pro tanto.

Lord Kenyon, Ch. J. This is a promiſory note, though not negotiable, and as it is not ſtamped it cannot be received in evidence. Then it is ſaid that we cannot take notice of the revenue laws of a foreign country: but I think we muſt reſort to the laws of the country in which the note was made; and unleſs it be good there it is not obligatory in a court of law here. But as there is a count on a quantum meruit, which was not conſidered at the trial, and as the inſtrument could not be given in evidence for want of the ſtamp, there muſt be a new trial in order to give the plaintiff an opportunity of recovering on the general count; therefore let there be a new trial.

Rule abſolute for a new trial.

(*a*) *Vid.* what is ſaid by Lord *Mansfield* in *Holman* v. *Johnſon*, *Cowp.* 343.

Neale and others *againſt* M. De Garay and F. De Eguino.

Tueſday, May 9th.

In a plea in abatement that another perſon ought to have been ſued with the defendant, it is not neceſſary to lay a venue.—And if it be pleaded that ſuch other perſon is alive, to wit, in *Spain*, it will be conſidered as pleaded without any venue.

THIS was an action of aſſumpſit; to which the defendants pleaded, in abatement, that the ſuppoſed promiſes, if any ſuch were made, were made by them jointly with one *B. De Garay*, and not by them without the ſaid *B. De Garay*, which ſaid *B. De Garay* is ſtill alive, to wit, in *Spain*; wherefore, &c.

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To this plea the plaintiff demurred; and aſſigned for cauſes that no certain venue or place within this kingdom where the ſaid *B. De Garay* is alive is alleged or ſhewn in the plea; that the ſaid *B. De Garay* is in the ſaid plea alleged to be alive in *Spain*, which allegation being of a tranſitory nature ought to have been pleaded or averred at the place or venue mentioned in the declaration; and that the defendants in their plea varied from the place or venue mentioned in the declaration without any neceſſity for ſo doing.

Marryat in ſupport of the demurrer, after premiſing that in every caſe of a tranſitory nature the defendant is bound to follow the venue laid in the declaration except in caſes where local matter is to be pleaded, objected to the plea, 1ſt, Becauſe the fact of *B. De Garay*'s being alive was pleaded without any venue laid in this kingdom; and 2dly, Becauſe the venue in the plea was a departure from the venue in the declaration. Firſt, wherever a material and traverſable fact is pleaded, a venue muſt be alleged; and the reaſon given for it in the books is, becauſe in ancient times the venire iſſued to the particular place where the fact happened. Here no venue is laid; for a venue out of the kingdom is conſidered in this reſpect as no venue at all. Secondly; but the other is a more forcible objection: this is not only a ground of demurrer, but before the ſtatute which required the cauſes of a demurrer to be ſpecified a departure from the venue laid in the declaration was not aided by pleading over, though the want of a venue was. In *Collins* v. *Sutton*, 1 *Lev.* 149; 1 *Sid.* 234; and 1 *Keb.* 816, judgment was given for the plaintiff on this ground on the authority of two caſes, the one in 9 *Ed.* 4. 46, the other *Dixon* v. *Williams*, *H.* 1665; in the latter of which the judgment for the plaintiff was affirmed on a writ of error. Formerly it was doubted whether a matter that aroſe in a foreign country could be tried by a jury of this, but that doubt was ſoon removed by deciding that the venue is only alleged for the ſake of conformity; *Dowdale*'s caſe, 6 *Co.* 46. *b.*: but ſtill in a tranſitory matter the defendant cannot depart from the venue laid in the declaration; *Bridgwater* v. *Bythway*, 3 *Lev.* 113. In *Dal.* 18. the plaintiff declared on a bond in *London*; the defendant pleaded that it was made at *D.* in the county of *N.*, and it was holden that the plea was bad.

Walton, *contrà*. 1ſt, Where the objection taken in the plea to the writ applies to the perſons ſuing or to thoſe who ought to have

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have been joined, it is not neceſſary that there ſhould be any venue at all. 2dly, If in common caſes a venue be neceſſary, it is not neceſſary in this particular caſe where the fact is pleaded in a foreign country. 3dly, At all events the venue in this plea may refer to the venue in the declaration. Firſt; No venue is neceſſary in pleas in abatement, in which reſpect there is a difference between pleas in bar and pleas in abatement. If alienage be pleaded in bar, it muſt be pleaded with a venue; if pleaded in abatement, no venue is neceſſary. *Weſt* v. *Sutton*, 2 Lord *Raym.* 853; *Pie* v. *Cooper*, 2 Lord *Raym.* 1243; and *Ord* v. *Howard*, 12 *Mod.* 125. In *Scawen* v. *Garrett* (*a*), where the defendant pleaded his privilege of attorney of the Common Pleas, it was objected that no place was laid where the defendant was attorney, nor where the Court of Common Pleas was: but *Holt*, Ch. J. ſaid that it was not neceſſary, becauſe that being a matter concerning the perſon of the defendant ſhould be tried where the writ was brought (*b*). So in *Jevens* v. The Adminiſtrators of *Levemere* (*c*), to debt for rent on an indenture of demiſe the defendant pleaded under the ſtatute 32 *Hen.* 8. *c.* 16. that *Levemere* was an artificer born out of the obedience of the king, to wit, at *Paris* in the kingdom of *France:* one objection was that no place was laid where *Levemere* was an alien artificer; but it was anſwered by the Court that that matter ſhould be tried where the writ was brought. Again in *Nutt* v. *Mills* (*d*), where the defendant pleaded in abatement that before the exhibiting of the bill he was knighted, it was objected that there was no venue laid where the defendant was knighted; but *Holt*, Ch. J. ſaid "There needs none, becauſe the plea going to the perſon it ſhall be tried where the action is laid." So in *Blake* v. *Dodemead* and Wife (*e*) it was holden on a writ of error that on a ſcire facias by baron and feme on a judgment recovered by the wife dum ſola the plaintiffs need not allege by way of venue where they were married: it was inſiſted by the counſel for the defendants in error (and their argument was adopted by the Court) that this was only a ſurmiſe relating to the perſon of the plaintiff and was but in nature of an exception in abatement; and that as to matters which go only in abatement of a writ it is not neceſſary to lay a venue. If ſo, ſaying that the other partner *B. De Garay* is

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(*a*) 2 Lord *Raym* 1173.

(*b*) See alſo *Williams* v. *Drury*, 12 *Mod.* 195.

(*c*) 1 *Saund.* 8.

(*d*) 2 Lord *Raym.* 1014.

(*e*) 2 Lord *Raym.* 1505. and 2 *Str.* 775.

alive *in Spain* may be rejected as ſurpluſage. This plea is alſo warranted by a variety of precedents in the ancient as well as modern books of entries. *Lib. Placitandi*, 179; *Raſt. Entr.* 106. *b. pl.* 5; 62. *a. pl.* 3. and 62. *b.* Pleas of joint-tenancy; 1 *Mod. Entr.* 19. plea of tenancy in common; *Hearne's Pleader*, 2. a plea of co-executor defendant; 1 *Mod. Entr.* 10. plea of co-obligor; *ib.* 20. plea of a partnerſhip; and *Imp. Inſtr. Cler.* 160. Secondly, Where the Court has juriſdiction to try the original queſtion, as they have to try the promiſes in this caſe, they have alſo juriſdiction to try any collateral fact that ariſes incidentally in the courſe of the cauſe, though it ariſe in a foreign country. 6 *Co.* 47. *b.* a caſe cited in *Dowdale*'s caſe; and *ib.* 48. *a.* another caſe there cited. And in *Dottin* v. *Dowrich* (*a*), in debt on bond conditioned for payment of money on the return of a certain ſhip from the Iſle of *May* to this country, the defendant pleaded that the ſhip was on &c ſafe at the Iſle of *May* in parts beyond the ſeas, to wit, at *Chudleigh*, but that ſhe was diſabled on her voyage &c: On this *Lutwiche* obſerved that the venue in the plea was repugnant and abſurd; that according to ſeveral authorities it was unneceſſary, and that he had taken particular notice of this to prevent ſuch abſurdities (if poſſible) for the future. In *Ilderton* v. *Ilderton* (*b*) the defendant having pleaded in dower ne unques accouple, the plaintiff replied that ſhe was married to *T. Ilderton at Edinburgh* in that part of *Great Britain* called *Scotland*, and the replication was ruled to be good. Thirdly, If a venue were neceſſary in this plea, the place where *B. De Garay* is alleged to be alive, to wit, in *Spain*, may be underſtood to be in *Middleſex*. No other county is mentioned, and then this place may be referred to the county in the margin. *Quarles* v. *Searle*, *Cro. Jac.* 96; and *Sutton* v. *Fenn*, 3 *Wilſ.* 339.

Marryat, in reply, obſerved that moſt of the caſes cited by the defendant on the firſt head were caſes of pleas to the perſon of the party on record; that the precedents alluded to only ſhewed at the moſt the want of a venue in thoſe caſes; and that the caſe of *Ilderton* v. *Ilderton* at leaſt proved the neceſſity of adhering to the venue laid in the declaration.

The Court took time to conſider of the caſe, and now their opinion was delivered, as follows, by

Lord Kenyon, Ch. J., who firſt ſtated the pleadings. It is certainly laid down in the books as a general propoſition that ſome

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(*a*) 1 *Lutw.* 699, 700.

(*b*) 2 *H. Bl. Rep.* 145.

place

place ſhould in pleading be alleged for every material fact which is alleged and may be traverſed; and that without neceſſity the defendant ſhall not vary from the venue laid in the declaration, as where ſome local matter is pleaded. But to this it is admitted that there is an exception, and that there needs no venue where matter is pleaded in abatement which concerns the perſon; and to take this caſe out of that exception it has been ſaid that joint-tenancy &c. in the plaintiff with another not named is ſuch plea; but that is not the caſe of a ſimilar plea that *the defendant and another* not ſued were joint contractors. But this diſtinction is not true; both are pleas concerning the perſon; and Lord Chief Baron *Comyns* in his Digeſt, *vol.* 1. *p.* 22. title "Abatement" (F. 8), claſſes the plea of a perſon not ſued being a joint contractor with the defendant, as a plea in abatement to the perſon of the defendant. When this was argued we doubted whether a diſtinction might not hold, which had formerly been allowed, between pleas in abatement to the perſon of the defendant triable by record, and thoſe triable by a jury; in which latter caſe it has been holden that there ſhould be a venue in the plea. This the Court held in *Stephens* v. *Squire*, *Carth.* 362. which was the caſe of an attorney who pleaded his privilege without annexing his writ of privilege to his plea; and the plea was holden to be bad for want of a venue, as it was not a matter triable by the record. The like was determined in *Fawkener* v. *Annis* in 1 *Ventr.* 264. where the privilege of Chancery was held to be ill-pleaded without a venue. But however this might have been formerly, it will not now be neceſſary to diſcuſs it, ſince the the ſtatute of Queen *Anne* has directed that the venue ſhall come from the body of the county. In conſequence of which it is laid down by *Eyre*, Ch. J. in the caſe of *Ilderton* v. *Ilderton*, 2 *H. Blackſtone* 161. that the principle now is, that the place laid in the declaration draws to it the trial of every thing that is tranſitory; and it ſhould ſeem that neither forms of pleading nor ancient rules of pleading eſtabliſhed upon a different principle ought now to prevail: and that ſince a defendant who pleads a matter ariſing in a foreign country would be obliged to lay the ſame venue as laid in the declaration, the repeating that venue, or laying no venue at all, is a diſtinction without a difference. And upon theſe principles that Court decided that a replication to a plea of ne unques accouple, ſtating the marriage to have been at *Edinburgh* in *Scotland*, without laying any venue in *England*, was a good re-

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plication, for that as the inſerting it in the replication would be nugatory, the want of it can do no harm. On the authority of this caſe which ſtands on the principles of ſound ſenſe, this plea is good, notwithſtanding there is no venue alleged.

With reſpect to the ſecond objection, if the plea be good notwithſtanding the want of a venue, the alleging the facts of the plea in a foreign country will not vitiate the plea; for the ground on which ſuch objection has prevailed is, that the ſtating a thing to have happened in a foreign country, without going on to ſay, to wit, in the pariſh of *St. Mary le Bow*, or ſome ſuch place, is in effect pleading a traverſable fact, without alleging a venue for its trial: but when it is ſettled that no venue is neceſſary the foundation of this ſecond objection fails. Therefore there muſt be

Judgment for the defendants.

Thurſday, May 18th.

DALMER *againſt* BARNARD.

The third clauſe of the annuity act requiring that in every deed, &c. *the conſideration* ſhall be really and *bonâ fide* ſtated, means the conſideration paid for the annuity, which is thereby required to be in *money only:* and if ſuch conſideration money be paid by an agent on behalf of the principal it muſt be ſo ſtated in the deed, and it is not ſufficient to ſtate that it was paid by the principal.

A RULE was granted calling on the plaintiff to ſhew cauſe why a certain bond and warrant of attorney to confeſs judgment and all other aſſurances given for ſecuring an annuity to the plaintiff from the defendant and one *Thomas Whaley* ſhould not be delivered up to be cancelled, and why the judgment entered in this cauſe ſhould not be vacated. The material facts appeared to be theſe; the defendant about *January* 1791 agreed to become ſecurity with *Whaley* for the payment of an annuity of 100*l.* to the plaintiff in conſideration of the ſum of 600*l.*, which *Whaley* was to receive. The tranſaction was negotiated by Mr. *Rowntree;* and it was admitted that there was an agreement at the time that the grantors might redeem the annuity on payment of 650*l.*, which was not then reduced to writing, but was afterwards and after the memorial had been enrolled under the act of parliament indorſed by way of memorandum on the bond. The purchaſe money was paid to *Whaley* by a man of the name of *Howſon*, who acted as agent for the plaintiff, who was not preſent at the time. The memorial enrolled was of a bond in the penal ſum of 1200*l.* from the defendant and *Whaley* to the plaintiff for ſecuring to him the annuity of 100*l.* witneſſed by *Rowntree* and *Howſon;* at the foot of which was a receipt by the defendant and *Whaley* for 600 *l.* "which ſum of 600*l.*" was the conſideration for the ſaid *Thomas Whaley* and *A. Barnard* execut-

ire as to the
ounds of this
cision. It strikes
e as very ob-
ictionable. But
make this remark
ith great defe-
rence: & according to this report
the arguments by Messrs. Erskine
Garrow & Rowden, Lords Thurlow
Loughborough were of the same
pinion in the Duke of Bolton &
Williams.

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ing the ſaid bond, and of granting the ſaid annuity thereby ſecured, and *was advanced and paid by or for the ſaid J. Dalmer* in promiſory notes of the Bank of *England* &c. at the time of the execution of the ſaid bond, as the conſideration for the purchaſe of the ſaid annuity; and which annuity was purchaſed by the ſaid *J. Dalmer* for his own uſe; and which receipt is likewiſe witneſſed &c." The memorial was alſo of two ſeveral warrants of attorney to confeſs judgment from *Whaley* and the defendant, in which the conſideration money was ſtated to have been paid *by Dalmer* &c.

Erſkine, *Garrow*, and *Plowden*, in ſupport of the rule ſtated ſeveral objections to the memorial, and the ſecurities. 1ſt. The firſt ſection of the 17 *Geo.* 3. *c.* 26. requires that a memorial of every deed bond inſtrument or other aſſurance for ſecuring an annuity ſhall within twenty days of the execution of the ſame be enrolled in Chancery, and every ſuch memorial ſhall contain, amongſt other things, "the conſideration or conſiderations of granting the annuity; otherwiſe every ſuch deed &c. ſhall be null and void to all intents and purpoſes." Now here the power of redemption was part of the conſideration for granting the annuity, and it is not ſtated in the memorial; therefore the ſecurities are void by the expreſs terms of the act. But 2dly, If it be not required that the memorial ſhould ſtate any other conſideration than that which is expreſſed in the deeds, ſtill by the third ſection the deeds themſelves are void for want of inſerting the power of redemption. 3dly, It is enacted "that in every deed &c, whereby any annuity ſhall be granted, the conſideration really and *bonâ fide* (which ſhall be in money only), and alſo the name or *names of the perſon or perſons by whom and on whoſe behalf* the ſaid conſideration or any part thereof ſhall be advanced ſhall be fully and truly ſet forth &c, otherwiſe every ſuch deed &c ſhall be null and void &c." Now here the conſideration money is falſely ſtated in the ſecurities to have been paid *by Dalmer;* it was paid *by Howſon for Dalmer*, and ought ſo to have been ſtated; for the very object of the annuity act was to furniſh evidence of all theſe ſecret tranſactions, and moſt of it's proviſions are calculated for that purpoſe. For this end it requires the names of all the witneſſes to the ſeveral inſtruments to be inſerted in the memorial, in order that all the actors in the tranſaction may be known. Above all it is neceſſary to know the hand

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by which the conſideration money was paid; otherwiſe the principal when called upon to give an account of it may ſhelter himſelf by ſtating that he was abſent at the time, and that the payment was made by ſome fictitious agent ſet up for the purpoſe who was never before heard of. Before the paſſing of the act the Courts had juriſdiction to ſet aſide fraudulent or oppreſſive bargains of this ſort; and the principal object of the Legiſlature in paſſing this act was to facilitate the means of detection by requiring an accurate ſtatement of the tranſaction while it was yet recent and could be checked by thoſe who were intereſted in diſcloſing the truth. The caſe of the D. of *Bolton* v. *Williams* (*a*) is directly in point. There Lord *Thurlow* in the firſt inſtance, and Lord *Loughborough* afterwards upon a rehearing, held the grant of an annuity to *Creſwell* from Mrs. *Williams* void for want of a proper memorial, the conſideration money being therein ſtated to have been paid by *Creſwell*, whereas in fact it was paid by one *Jenkins*, the agent for *Creſwell*. Lord *Loughborough* there ſaid that, "If this could ſtand, it would be neceſſary immediately to repeal the act; for the conſequence would be that the memorial, which it was obvious ſhould ſerve as a check on theſe tranſactions, would be a cover to them." And in another place he ſaid, "That he could not agree with the argument that the omiſſion of the actual mode in which the payment was made was a mere matter of circumſtance. Circumſtances of as little moment as the names of the witneſſes &c were required in other parts of the act. The object of the Legiſlature was that the whole tranſaction, the names of all the parties concerned, of whom inquiry might be made or who might be called on as witneſſes, ſhould be inſerted."

The Court were of opinion that "*the conſideration*" required by the 3d ſect. of the act to be ſtated in every deed &c, whereby any annuity was granted, meant the conſideration which was paid by the grantee, and which that ſection expreſsly requires "*ſhall be in money only*;" and could not be extended to a power of redemption intended to be reſerved to the grantor. Though if a clauſe of that nature had been inſerted in the deed (*b*), it muſt have been ſtated in the memorial according to ſeveral decided caſes. But they directed the plaintiff's counſel to ſpeak to the laſt objection.

(*a*) 2 *Vez.* jun. 138. 152, 3. 4 *Bro. Cha. Caſ.* 297. S. C.

(*b*) *Vid. Stedman* v. *Purchaſe*, *ante* 6 vol. 737; and *Harris* v. *Stapleton*, *ante* 205.

Gibbs and *Adam*, againſt the rule, relied upon the maxim *qui facit per alium facit per ſe.* If *A.* ſend his ſervant to pay money, it is a payment by *A.* and may properly be ſo ſtated to be. This muſt be admitted to be true generally; and no reaſon has been urged why an exception ſhould be made upon the conſtruction of the annuity act. Indeed the money cannot with propriety be ſtated to be advanced by a perſon ſtanding in the relation of a ſervant or agent to another. It is true that the point appears to have been decided otherwiſe in the caſe cited: but the argument ſeems to have proceeded upon a miſtake in not ſufficiently attending to the proviſions of the firſt and third clauſes. The firſt clauſe requires the names of all the parties to the deed &c. to be ſtated, and for whom any of them are truſtees &c; all which is required to be ſtated in the memorial. The third clauſe, requiring the names of the parties by whom and on whoſe behalf the conſideration money was paid to be ſtated in the deed, has reference to the former proviſion, where the parties to the deed ſtand in the relation of truſtees for others: but here the principal, who advanced the money, was the grantee of the annuity; and therefore he may with propriety ſtate that the money was advanced by him or on his behalf.

The Court will take cognizance of affidavits ſworn before foreign magiſtrates if properly authenticated to them.

In the courſe of ſhewing cauſe againſt the rule a preliminary objection was taken by the plaintiff's counſel, that the affidavit on which the rule was obtained could not be read, not being ſworn before any perſon authoriſed to take affidavits in this Court, it having been taken before one *John Coſnaham* who ſtiled himſelf "high bailiff and chief magiſtrate of the diſtrict of *Douglas* in the *Iſle of Man*," of whom (they argued) that the Court could not take notice either that there was ſuch a perſon, or that he filled the office he deſcribed, or that ſuch officer had a power of taking affidavits in the *Iſle of Man*, or that this which purported to be an affidavit taken before ſuch an officer was really ſworn before him.

Upon reference to the affidavit it appeared in this form "ſworn "the 6th day of *February* 1797 before me *John Coſnaham* high "bailiff and chief magiſtrate of the diſtrict of *Douglas* in the "*Iſle of Man*."

There was alſo an affidavit ſworn in this Court by *Joſeph Chriſtian*, who therein depoſed "that he had ſeen *John Coſnaham*

1797.

DALMER
againſt
BARNARD.

Eſq. high bailiff and chief magiſtrate of the diſtrict of *Douglas* in the *Iſle of Man* write, and that he verily believed the name *John Coſnaham* ſubſcribed at the foot of the paper written &c (being that above deſcribed) was of the proper hand-writing of the ſaid *John Coſnaham* &c.

The Court were very clearly of opinion that they could take cognizance of affidavits ſworn before foreign judicatures, properly authenticated to them. That it was the conſtant practice for the judges here to receive affidavits ſworn before the judges of *Scotland* and *Ireland*. And as to this not being properly authenticated before them, the affidavit of *Chriſtian* ſworn in this Court was a ſufficient anſwer to the objection in that reſpect (*a*).

They were alſo of opinion that the third objection was fatal; and

Lord KENYON, Ch. J. ſaid, The Legiſlature having required that "the name or names of the perſon or perſons, by whom *and on whoſe behalf* the conſideration was advanced, ſhould be truly ſet forth," I think that the names of both the perſons ſhould be inſerted when the perſon actually paying the money pays it on account of ſome other perſon. When this motion was firſt made, I alluded to the maxim *qui facit per alium facit per ſe*, without attending to the particular words of this act of parliament: but thoſe words are ſo explicit as to leave no room for doubt. I wiſh there was an uniformity of deciſion in all the Courts of juſtice upon this act. Unfortunately the deciſions here on interlocutory motions are not the ſubject of a writ of error: but the deciſions in Chancery on this ſubject may be reviewed by the Houſe of Lords on appeal. Now if the parties were diſſatisfied with the deciſion in the caſe cited of the D. of *Bolton* v. *Williams*, they might have queſtioned it's propriety in the Houſe of Lords by appeal: but as that deciſion was acquieſced in when the parties had an opportunity of going to the appellant juriſdiction, it has acquired ſome weight by that circumſtance. And this very caſe was there decided; where the Lord Chancellor ſaid that the ſtatute required, and that it was eſſential to the juſtice of the caſe, that the name of the agent as well as the principal ſhould be ſet forth, that the whole *res geſtæ* might appear for the ſake of a direction to every quarter from whence information may be collected. *Et lex plus laudatur quando ratione probatur.* The

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(*a*) *Vid. Ex parte Worſley*, 2 *H. Bl. Rep.* 275.

Legiſlature foreſaw that much miſchief was done by effecting tranſactions of this kind in a private room, where the money was paid by an agent who received a large premium while the perſon actually advancing the money was in an adjoining room, and that if the agent's name were not diſcloſed ſo that recourſe might be had to him to know what really paſſed the truth could not be obtained, ſince in ſuch caſe the principal not being preſent could not give all the information; and therefore they required the inſertion of the agent's name as well as that of the principal. And I perfectly agree with the opinions of Lord *Thurlow* and Lord *Loughborough* that if this conſtruction be not put on the act of parliament the parties will have an opportunity of doing the very thing that the ſtatute meant to prohibit. Therefore as well on the authority of that caſe as on the words of the act of parliament I think that this rule ought to be made abſolute as far as reſpects the bond and warrant of attorney.

ASHHURST, J. We ought not to narrow the conſtruction of this act of parliament, the words of which are ſo plain and the meaning ſo evident. If the plaintiff's conſtruction were to prevail the words in the act "by whom" would be rendered nugatory: but the Legiſlature appear to have added thoſe words to apply to ſuch a caſe as the preſent.

GROSE, J. The queſtion is, Whether every thing has been done in this caſe that could be done and that the act requires? Now it is plain both on the words and the meaning of the act that every thing that the act requires has not been done. I lament that our deciſions are not ſubject to review in every inſtance: but I lament that circumſtance the leſs in this caſe, becauſe if the plaintiff be diſſatiſfied with our determination he may ſtill bring an action on the deed, and then if the objection under the act be pleaded the queſtion will appear on the record, and a writ of error may be brought.

LAWRENCE, J. It has been ſuppoſed that the deciſion in The Duke of *Bolton* v. *Williams* proceeded on a confuſion of the firſt and third ſections of the act: but the third ſection ſays that a deed ſhall be void if the names of the agent and principal be not inſerted; then the warrant of attorney in this caſe is void and cannot be the foundation of a judgment.

The Court made the rule abſolute as far as reſpected the vacating of the warrant of attorney and judgment, and diſcharged it as to the deed.

Thurſday, May 18th.

Myers and three others *againſt* Edge.

A promiſe in writing directed to *A. B.* and *C.*, a houſe in trade, to pay for goods to be furniſhed to another cannot be enforced in an action by *B.* and *C.* to recover the value of goods furniſhed after *A.* had withdrawn from the partnerſhip.

THE declaration ſtated that in conſideration that the plaintiffs would ſell to one *T. Duxbury* a quantity of cotton twiſt, the defendant undertook to pay as much as it ſhould be worth, if *T. Duxbury* did not when thereunto requeſted; that the plaintiffs accordingly ſold and delivered to *T. Duxbury* a certain quantity, but the defendant refuſed to pay &c; to which the defendant pleaded the general iſſue. At the trial before *Rooke*, J. at *Lancaſter* the plaintiffs to take the caſe out of the ſtatute of Frauds gave in evidence the following letter written by the defendant dated *January* 15th 1794. "To Meſſrs. *Myers*, *Fielden*, *Ainſworth*, and "Co. If you pleaſe you may let the bearer *Thomas Duxbury* have "ſix bunches of twiſt more than I told you, and I will be anſwerable for them as before; and after this I will be anſwerable for "one pack and no more; ſo when he pays you for the firſt half "pack, you may let him have another, and ſo on till I tell you "to the contrary; and you may make the invoice to us both," &c. At the time when this engagement was entered into *Ainſworth* was a partner in the ſame houſe with the plaintiffs, and continued ſo till *May* 1795; during which time many parcels of goods were delivered to *Duxbury*, which were all paid for by him who was debited for them in the plaintiffs' books. The goods in queſtion were furniſhed to *Duxbury* by the plaintiffs alone after *Ainſworth* had retired from the partnerſhip, and *Duxbury* having failed to pay for them they demanded payment of the defendant, who ſaid it ſhould be ſettled, and requeſted time; but afterwards refuſing to pay, this action was brought. It was objected on the part of the defendant that the action could not be maintained by the preſent plaintiffs, becauſe *Ainſworth* with whom alſo the contract was made was not joined with them, and he not being a partner at the time when the goods were furniſhed (*a*). *Rooke*, J. overruled the objection, conſidering the ſecurity as having been given to the houſe and not to the individuals; and the jury found a verdict for the plaintiffs. A rule was granted in this term calling on the plaintiffs

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(*a*) Other objections were made on the extent of the contract as ſtated in the letter, and other collateral circumſtances; but the opinion of the Court was confined to the point ſtated.

1797.

Myers against Edge.

plaintiffs to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit entered, or a new trial granted (*a*).

Law and *Topping* ſhewed cauſe againſt the rule. The promiſe was not intended to be made to the partners nominatim, but as to a known houſe of trade, *i. e.* to them or ſuch of them as ſhould continue to carry on the buſineſs of the houſe. Perhaps the caſe might have been different if a new partner had been introduced, according to the caſe of *Wright* v. *Ruſſell* (*b*): but the defendant pledged his credit to all the preſent plaintiffs, and he cannot be permitted to object that he alſo pledged it to another. And the defendant's own conduct is concluſive againſt him that ſuch was the underſtanding of the contract; for after *Ainſworth* ceaſed to be a partner, which was known to him, he admitted the debt and deſired time. The caſe of *Barclay* v. *Lucas* (*c*) is in point; where it was holden that a bond taken for the fidelity of a clerk, who was taken into the ſervice of the obligees *as a clerk in their ſhop and counting-houſe*, was not diſcharged by the obligees' taking another partner into their houſe, and that they might recover money received and purloined by ſuch clerk after the change of partners. That was ſo decided on the ground that it was intended as a ſecurity to the houſe of trade, and not to the particular individuals. And it was diſtinguiſhed from the caſe of *Wright* v. *Ruſſell*, the extent of which was doubted by ſome of the judges.

Chambre, and *Holroyd*, *contrà*. It may be doubted whether the caſe of *Barclay* v. *Lucas* is ſtrictly maintainable in point of law, conſidering the deciſion in *Wright* v. *Ruſſell*. But at any rate it is diſtinguiſhable from the preſent caſe. For there the action was brought by *all* the parties with whom the contract was made, and the breach was laid to be the non-payment to them, without mixing the intereſt of the perſon who had been taken into partnerſhip after the obligation made. Therefore in order to aſſimilate the two caſes, *Ainſworth* ought to have joined in this action, ſuppoſing no other objection would then have ariſen; for as a choſe in action cannot ſtrictly be aſſigned, the action muſt be brought in the names of the original parties intereſted. Then it is urged that the intent was not to contract with the partners nominatim, but as a houſe: but the letter which is the written evidence of the contract, and on which alone it can be ſuſtained,

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(*a*) This branch of the rule was inſerted on account of the other parts of the caſe.

(*b*) 3 *Wilſ.* 532.

(*c*) *M.* 24 *Geo.* 3. cited *ante* 1 vol. 291.

is particularly addreſſed to *Ainſworth* as well as to the others by name; the argument therefore is not founded in fact. The inconvenience of the conſtruction contended for by the plaintiffs would be great; for then ſuppoſing the houſe had divided two and two, and carried on the buſineſs ſeparately, it might have been contended that the credit went with each. Then it is ſaid that the ſubſequent promiſe amounts to a new undertaking with the plaintiffs; but that could not be ſupported, not being in writing, unleſs it were conſidered to be an undertaking to be ſolely anſwerable for the goods; but the evidence ſhews that it was merely a collateral promiſe, and had reference to the antecedent engagement.

Lord KENYON, Ch. J. I think that the rule ought to be made abſolute. We are to judge on the contract that the parties have made, and ought not to ſubſtitute another in lieu of it. Here the defendant contracted with *Myers*, *Fielden*, *Ainſworth*, and Co. Perhaps the defendant, when he entered into this contract, had great confidence in *Ainſworth*, and thought that he would uſe due diligence in enforcing payment of the goods from *Duxbury* regularly as they were furniſhed; at leaſt it is too much for us to ſay that, after *Ainſworth* ceaſed to be a partner, the defendant would have given the ſame credit to the remaining partners. I diſclaim going on the ground of fraud in this caſe, the jury not having found that there was any fraud. If on a new trial the plaintiffs can produce any other evidence to affect the defendant, they will have an opportunity of doing ſo. But we cannot ſay that a contract, that on the face of it imports to have been made with five, ought to be conſtrued to be a contract made with four perſons only. I very much approve of the caſe cited from 3 *Wilſon*.

ASHHURST, J. This is not a contract made with a corporation; it is made with a partnerſhip conſiſting of a certain number of individuals: and when one of the partners left the buſineſs, it put an end to this engagement. If the plaintiffs had intended to furniſh goods to *Duxbury* after this alteration in the partnerſhip, they ſhould have required a new undertaking.

GROSE, J. The letter, on which the plaintiffs relied as an engagement on the part of the defendant to the partnerſhip houſe, is directed to the partners nominatim; and therefore when *Ainſworth* ceaſed to be a partner, the plaintiffs ſhould have applied to the defendant to renew his undertaking. I agree with the

the doctrine eſtabliſhed by the caſe in *Wilſon*, which is an authority for our determination againſt the plaintiffs.

Lawrence, J. declared himſelf of the ſame opinion.

Rule abſolute.

Bristow *againſt* James.

Friday, May 19th.

To an action of debt on the 9 *Ann.* c. 14. to recover back money won at play the defendant may plead in abatement that the money was due from others not named as well as from himſelf.

THIS was an action of debt on the 9 *Ann.* *c.* 14. for 1890*l.*; wherein the plaintiff declared that the defendant after the 1ſt *May* 1711, to wit, on the 10th *June* 1796 at &c. was indebted to the plaintiff in 945*l.* which the plaintiff had before that time and after the ſaid 1ſt *May* 1711, and alſo within three months next before the exhibiting of the plaintiff's bill in this behalf, *ſcil.* on 26th *May* 1796 at &c loſt to the defendant at one and the ſame ſitting by playing at cards with the defendant, and which the plaintiff had then and there paid to the defendant; whereby and by force of the ſtatute (*a*) an action had accrued to the plaintiff to demand and have of the defendant 945*l.* parcel of the 1890*l.* above demanded. And alſo for that the defendant was indebted to the plaintiff in other 945*l.* for ſo much money by the defendant before that time and within three months next before the exhibiting of the plaintiff's bill received to the uſe of the plaintiff, whereby &c.

Plea in abatement that, if the ſaid ſum of 1890*l.* in the bill and declaration mentioned be due and owing to the plaintiff, the ſame is jointly due and owing to him from the defendant one *G. R.* and one *G. A.*, and that the ſame or any part thereof is not due and owing from the defendant alone or without the ſaid *G. R.* and *G. A.*, and that the ſaid *G. R.* and *G. A.* at the time of exhibiting the bill of the plaintiff againſt the defendant were and each of them was ſtill living to wit at &c.

To this there was a general demurrer and joinder.

Holroyd in ſupport of the demurrer. There is no precedent of ſuch a plea in abatement to an action of debt given by a ſtatute for the doing of an illegal act. This diſtinction is not upon the form but on the nature of the action (*b*). Where the cauſe of action ariſes ex contractu ſuch a plea is good, but not where it ariſes ex delicto. In the former caſe the defendant may inſiſt on being ſued with others according to the legal operation of the contract;

(*a*) Stat. 9 *Ann.* *c.* 14.

(*b*) Vid. *Buddle* v. *Wilſon*, *ante*, 6 vol. 369.

contract; but in the latter he is anſwerable immediately for a breach of a moral or political duty, and cannot inſiſt that others who were partners with him in the crime ſhould be joined with him. This diſtinction was taken in *Mitchell* v. *Tarbutt* and others (*a*), where in an action on the caſe againſt ſeveral partners for negligence in their ſervant, whereby the plaintiff's goods were loſt, a plea in abatement that there were other partners not named was holden bad. Though the form of this action is debt, yet the cauſe of it ariſes ex delicto for a direct breach of the law. All the parties concerned are wrong-doers; and therefore, as in treſpaſs or felony, each is anſwerable for the acts of the others done in contemplation and purſuance of the illegal combination. Here the illegal act is the receipt of the money, and each perſon acting a part in the tranſaction is anſwerable as if he had received the whole; for if more than 10*l.* be loſt at one ſitting, though to different perſons, the whole is illegally received. Suppoſe inſtead of money goods had been loſt at play, and trover had been brought againſt the defendant to recover them back under the ſame law, he could not have alleged that others were jointly concerned with him in taking the goods. The two caſes in this reſpect are preciſely ſimilar; the wrongful receipt of the money in the one inſtance, and the wrongful converſion of the goods in the other, are both made illegal by this act. And the form of the declaration which is directed by the ſtatute makes no difference. The act directs that the money may be recovered againſt the *winner or winners;* and therefore as under the game laws, where the penalty is inflicted on the *perſon or perſons*, the penalty may be recovered againſt one or all, though only one penalty can be recovered for the ſame offence (*b*).

Wigley, *contrà*, was ſtopped by the Court.

Lord Kenyon, Ch. J. I am very ſorry to be obliged to yield to the objection taken by the defendant: but it is impoſſible to ſay that this action of debt for money had and received to the plaintiff's uſe ariſes ex delicto ſo as to exclude the plea in abatement. In the inſtance of trover, put at the bar, the nature of the action is deciſive; that is a tort, and each perſon is there anſwerable: but here the act of parliament ſays that if any perſon ſhall loſe at play a certain ſum he may recover it back again, not by way of a penalty but by way of a contract raiſed by the act;

(*a*) *Ante*, 5 vol. 649.

(*b*) Vid. *Bull. N. P.* 188, 9.

the ſtatute gives this action on the idea of there being a contract, and the act has always been conſidered as a remedial law. I agree to the diſtinction taken between actions of tort and contract; that in the former the parties may be ſeparately ſued, but that in the latter all muſt be joined if the defendant plead in abatement. This is an action founded on a contract raiſed by the act of parliament, and is not diſtinguiſhable from other actions of contract.

Ashhurst, J. and Grose, J. of the ſame opinion.

Lawrence, J. In a caſe in *Strange* (*a*) it was decided that, where the party grieved ſues on this ſtatute, the defendant may be held to bail; and in a caſe in *Blackſtone* (*b*) it was ſaid that this ſtatute makes the winning of 10*l.* at one time a nullity, and gives the loſer an action to recover back what ſtill properly continues to be his own money. Then it is ſo much money received by the defendant to the plaintiff's uſe. And in a caſe of *Brandon* v. *Pate* (*c*) it was holden that the aſſignees of a bankrupt might under this ſtatute recover money loſt by the bankrupt before his bankruptcy; now that determination muſt have proceeded on the ground of it's being a contract.

The Court however gave the plaintiff leave to withdraw the demurrer, and to take iſſue on the fact in the plea.

(*a*) Vid. *Turner* v. *Warren*, 2 *Str.* 1079.

(*b*) Vid. *Bowes* v. *Booth*, 2 *Bl. Rep.* 1226.

(*c*) 2 *H. Bl. Rep.* 308.

The Preſident and Scholars of St. John's College, Oxford, *againſt* Murcott.

Friday, May 19th.

A ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the goods ſo diſtrained, and afterwards the outlawry was reverſed: ruled that the officer was liable to pay the produce of the goods to the landlord in an action for money had and received.—The goods of a tenant are liable to a year's rent, notwithſtanding an outlawry in a civil ſuit.

On the trial of this action for money had and received by the defendant to the uſe of the plaintiffs a verdict was taken for the plaintiffs with damages 166*l.*, ſubject to the opinion of this Court on the following caſe.

On the 21ſt of *November* 1791 *W. Grant*, the tenant of a farm at *Waſperton* in the county of *Warwick* under the plaintiffs at the yearly rent of 166*l*, was outlawed in an action of treſpaſs on the caſe upon promiſes at the ſuit of *W. Priddle*. On the 25th of *April* 1792 a writ of capias utlagatum directed to the ſheriff of the county of *Warwick* was iſſued againſt *Grant*; on which the ſheriff on the 7th of *May* 1792 iſſued his warrant directed to the defendant and other perſons, commanding them to ſeize the goods and chattels lands and tenements of *Grant*, ſo that the ſheriff might cauſe the ſame to be appraiſed and ſeized into his majeſty's hands; under that warrant the defendant entered upon the farm in the occupation of *Grant*, and took poſſeſſion of all the goods and chattels that *Grant* then had upon the premiſes. The ſheriff then ſummoned a jury to take an inquiſition by virtue of the writ on the 11th of *May*, but the inquiſition was then adjourned to the next day, when it was taken. On the 11th of *May* (the defendant being then in poſſeſſion of the farm and of the goods and chattels of *Grant* under the ſaid writ) the Reverend *T. Welſh* on behalf of the plaintiffs applied to the defendant, and informed him that a year's rent of the farm was due to the plaintiffs from *Grant*, and that he intended to diſtrain for it: the defendant then offered to make the diſtreſs for the plaintiffs, and ſaid he could do it as well as another; Mr. *Welſh* then gave the defendant directions to make the diſtreſs, and accordingly on the 12th of *May* he diſtrained part of the effects already in his poſſeſſion under the writ, but not any of the crops growing on the premiſes. Being himſelf an auctioneer, he on the 18th of *May* ſold by auction ſufficient to produce the 166*l.* due for rent and the expences of making the diſtreſs, and about a week after the ſale the defendant told Mr. *Welſh* that the buſineſs was all finiſhed, that he had lodged the money in the hands of his bankers, and it was ready whenever the College choſe to demand it. About a fortnight afterwards Mr. *Welſh* applied to the defendant for the money, but the defendant then told him that he had had advice upon the buſineſs, that he apprehended the diſtreſs was not legal, and he would not pay the money. The defendant continued in the occupation of the farm under the writ, and when the crops growing on the farm became ripe reaped them, and got in the harveſt. On the 4th of *October* 1792 the outlawry againſt *Grant* was reverſed. On the 24th of *October* a writ of amoveas manus on the reverſal of the outlawry was iſſued; and on the 7th of *November* a warrant, iſſued by the ſheriff on the ſaid writ, was delivered to the defendant; and the defendant on the ſame day quitted the poſſeſſion of the farm, and the tenant re-entered. In *July* 1793 after the defendant had quitted the poſſeſſion of the farm Mr. *Welſh* again applied to him for the 166*l.*, but the defendant refuſed to pay it, ſaying that he had expended money in getting in the crops upon the farm, and if *Grant* would pay him for that expence he would pay the 166*l.* to the plaintiffs.

Vaughan, for the plaintiffs, admitted that the perſonal goods and chattels of the tenant became forfeited and veſted in the crown immediately on the outlawry, and that the profits of the lands were veſted in the crown from the time of the inquiſition found; *Britton* v. *Cole*, *Salk.* 395; and therefore if the outlawry had remained in force, as it preceded the diſtreſs, the goods ſeized would have been the property of the crown and not of the tenant. But it appears in the caſe that the judgment of outlawry has been reverſed; and therefore it becomes material to conſider the effect of a reverſal of ſuch a judgment. "Outlawry in civil actions is conſidered as in the nature of civil proceſs to compel an appearance to the ſuit. If the outlaw appears, pays all coſts, puts in ſufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally, the Court reverſes the outlawry upon motion without any writ of error." 4 *Burr.* 2549. The form of the reverſal is, "*Ideo conſideratum eſt quod prædictus* W. G. *de utlagariâ prædictâ exoneretur, et eâ occaſione non moleſtetur in aliquo nec gravetur, ſed ſit et eat inde quietus* &c. *Co. Entr.* 689; *Lill. Entr.* 465. The effect of the reverſal then is to reſtore the party as fully and completely to all his rights and all his property as if no proceſs of outlawry had ever iſſued. Perhaps the plaintiffs might have objected at the trial to the production of the record of outlawry, becauſe after the reverſal it ceaſed to be an operative judgment. After a judgment of outlawry is reverſed, the tenant may maintain treſpaſs for any injury done to the land by a ſtranger during the outlawry; *Manville*'s caſe, 13 *Co.* 21, 22; *Ognell*'s caſe, *Cro. Eliz.* 270; or he may maintain an ejectment, and lay the demiſe during the time of the outlawry, or bring trover for the goods even againſt the ſheriff after he has ſold them. In *Eyre* v. *Woodfine* (*a*), where on an outlawry againſt a termor for years the term was ſeized and ſold, two judges, againſt the opinion of one, held that the termor ſhould have his term again, for the outlawry being reverſed it was as if there had been no record, and the

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(*a*) *Cro. Eliz.* 278.

Queen's intereſt was but conditional, that is, good if the outlawry were good. The ſame doctrine as to the Queen's title being conditional is alſo to be found in *Buckley* v. *Wilkinſon*, 2 *Show.* 68; *Hoe*'s caſe, 5 *Co.* 90. *b;* and in *Skin.* 615. where Lord *Holt* ſaid "when the outlawry is reverſed, by relation the money was the property of the party all the time." Then if the goods were the property of the tenant, the diſtreſs made on behalf of the plaintiff was legal, and the plaintiff is entitled to the produce of the ſale. But, ſecondly, even if the diſtreſs were illegal, it is not competent to the defendant to diſpute the authority under which he acted. This being an action for money had and received, the plaintiffs are entitled to recover the money that the defendant has received for them and cannot in conſcience retain. The defendant voluntarily acted as the agent of the plaintiffs in receiving the money, and he cannot now ſhelter himſelf under the other character that he ſets up, that of ſheriff's officer. If the plaintiffs had employed any other perſon to levy the diſtreſs, it would not have been competent to him to avail himſelf of the rights of any other perſon as againſt them; then neither can the defendant be permitted to do ſo, though he happen alſo to be the ſheriff's officer. To whoſe uſe was the money received, if not to the plaintiffs? It could not be received to the uſe of the crown, becauſe the reverſal of outlawry has extinguiſhed all title in the crown. If received to the uſe of the tenant, the goods by the ſale of which the money was produced were the goods of the tenant, and then the diſtreſs was legal.

Romilly for the defendant. By the judgment of outlawry againſt the tenant the property of the goods ſeized was veſted in the crown, and therefore they were not liable to the plaintiffs' diſtreſs. "By the outlawry the plaintiff recovers nothing, but the King taketh the whole benefit thereof." *Co. Lit.* 288. *b.* In *R.* v. *Baden* (*a*) the ſame point was eſtabliſhed, though the counſel for the plaintiff in error attempted to take a diſtinction between an outlawry in a civil and a criminal ſuit. As to the effect of the reverſal of outlawry; it only puts the defendant in outlawry in the ſame ſituation in which he was when the judgment in outlawry was pronounced; and the caſes cited for the plaintiffs eſtabliſh that doctrine: but the party is not put in the ſame ſituation if during the outlawry the goods could be deveſted out of him

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(*a*) *Show. P. C.* 72.

him by any intermediate proceſs; a deciſion in favor of the plaintiffs would be productive of great injuſtice, for the tenant could not replevy the goods when they were taken, or make any defence to the diſtreſs on account of the judgment of outlawry then outſtanding againſt him. The caſe cited from *Coke* ſhews that the tenant might have maintained trover for theſe goods; and if ſo, he is of courſe entitled to the produce of them now they are ſold. With regard to *Eyre* v. *Woodfine*, which was cited to ſhew that a termor might recover his term after the outlawry was reverſed; it does not prove that an ejectment brought *againſt* a tenant during the term would have been made good by the reverſal of the outlawry. And *Hoe*'s caſe ſhews that there could be no property in the tenant during the outlawry. But, ſecondly, it is ſaid that the defendant having acted for the plaintiffs cannot ſet up this defence; and it was aſked to whoſe uſe was the money received by the defendant; the anſwer is, that it was received to the uſe of the crown during the outlawry, and to the uſe of the tenant after the outlawry was reverſed. If the tenant were to ſue the defendant for the produce of theſe goods, the latter could make no defence, as is manifeſt from the caſes cited by the plaintiffs; therefore he ought not to be anſwerable in this action alſo.

Lord KENYON, Ch. J. This is a moſt diſhonourable defence to the action. I will not conjecture for what purpoſe the outlawry was contrived, or whether or not there was any colluſion between the parties in order to turn all the profits of this farm into an improper channel; it is ſufficient to ſay that the outlawry turns out to be wrong from the beginning; and if the goods on the farm were not duly in *cuſtodiâ legis*, they are clearly anſwerable to the plaintiffs for rent. At the time when the college made this diſtreſs, they found the defendant in poſſeſſion of the tenant's goods under this ſuppoſed outlawry; the defendant, perhaps looking forward to the time when the outlawry would turn out to be invalid, ſaid to the plaintiffs "I am already in poſſeſſion of the tenant's goods, and I will make the diſtreſs for you;" he accordingly made the diſtreſs, ſold the goods, and now has the money in his hands, and yet objects to paying it to the plaintiffs, becauſe he ſays that by means of the outlawry the property in the goods was deveſted out of the tenant. But the outlawry is reverſed; there is now no incumbrance on the goods; and in point of honeſty and of law the defendant ought to pay this

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this money to the plaintiffs. It would be a diſgrace to the laws of the land if on this queſtion the mind could deliberate. There is not even a ſemblance of argument in point of reaſon in the defence; and the artificial reaſoning of the defendant is cut up by the roots by the arguments and authorities cited on behalf of the plaintiffs. I am glad to find that the law falls in with the juſtice of the caſe, and that the plaintiffs are entitled to recover.

Ashhurst, J. The inſtant this outlawry was reverſed the judgment of outlawry became mere waſte paper, and the rights of all the parties were reſtored to the ſame ſituation as if no outlawry had taken place. In this caſe the defendant made this diſtreſs for the plaintiffs at his own requeſt; and having received the money he objects to pay it over to his employers on another account with which they have no concern: but having taken upon himſelf to act as their bailiff, and the bar which before exiſted being now removed by the reverſal of the outlawry, it appears that he has received money for the uſe of the plaintiffs, which in conſcience he is not entitled to retain merely on account of his having ſome demand on the tenant. And with regard to that demand, the defendant is not without a remedy; for if during the time he was in poſſeſſion under the outlawry he was put to any expence in reaping and getting in the crops he may maintain an action againſt the tenant to recover thoſe expences.

Grose, J. declared himſelf of the ſame opinion.

Lawrence, J. The defendant's counſel has taken it for granted that there is no diſtinction in this reſpect between an outlawry at the ſuit of the party and in the caſe of the King. But in *Greaves* v. *D'Acaſtro* (*a*), *R.* v. *Southerby* (*b*), and *R.* v. *Pritchard* (*c*), a diſtinction is taken between proceedings at the ſuit and for the benefit of the crown (*d*) and an outlawry in a civil ſuit; and in the latter inſtance it was ruled that "the landlord ought to be ſatisfied a year's rent, becauſe a capias utlagatum

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(*a*) *Bunb.* 194.

(*b*) *Ib.* 5.

(*c*) *Ib.* 269.

(*d*) By ſtat. 8 *An. c.* 14. *ſ.* 1. it is enacted that no goods on any meſſuage lands &c, leaſed for lives years &c, ſhall be liable to be taken by virtue of any execution, unleſs the party at whoſe ſuit the execution is ſued out ſhall before the removal of ſuch goods from off the premiſes by virtue of ſuch execution or extent pay to the landlord all rent due not exceeding one year's rent. And *ſect.* 8. contains a proviſo that nothing in the act ſhall extend to let hinder or prejudice her majeſty her heirs or ſucceſſors in the levying recovering or ſeizing of any debts fines penalties or forfeitures; but that it ſhall be lawful for her majeſty &c to levy recover and ſeize ſuch debts fines penalties and forfeitures in the ſame manner as if the act had not been made.

at the ſuit of the party is to be conſidered only as a private execution." And therefore, even if this outlawry had not been reverſed, the plaintiffs would have been entitled to a year's rent.

Poſtea to the plaintiffs.

Barnes *againſt* Trompowsky.

Friday, May 19th.

An inſtrument executed abroad and witneſſed by a foreigner reſiding there may be proved by evidence of the hand-writing of the witneſs and of the contracting party; but not by the latter alone.

DEBT on a charter-party of affreightment not under ſeal. The charter-party, being produced at the trial at *York* before *Rooke*, J. appeared to be dated the 26th *September* 1795, and ſigned by the name of *M. Trompowſky*, and atteſted by one *Knieriem*, whoſe ſeal as a ſworn broker was affixed to the inſtrument. A witneſs was called, who was a merchant reſiding at *Hull* long converſant in the *Ruſſia* trade and in habits of correſpondence with the defendant, and who proved the ſignature to the charter-party to be his handwriting; he alſo proved that eight years ago a ſworn broker named *Knieriem* was living and reſident at *Riga*, and he had not heard of his death. Another witneſs proved that he knew *Knieriem* acting there as a broker in 1790; but neither of theſe witneſſes knew his handwriting. After the plaintiff had gone through his whole caſe, it was objected, amongſt other things, that the charter-party was not duly proved: but the learned judge thought there was ſufficient evidence to go to the jury; and the plaintiff recovered a verdict. A rule was obtained on a former day in this term calling on the plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had on the ground of this as well as ſeveral other objections, which were ſtated; but the Court deſired the plaintiff's counſel on ſhewing cauſe to confine themſelves to this objection.

Law, *Chambre*, and *Raine*, ſhewed cauſe againſt the rule; contending that under all the circumſtances this was the beſt evidence within the power of the plaintiff to produce. In *Swire* v. *Bell* (*a*), where the party could not examine the ſubſcribing witneſs to a bond by reaſon of his intereſt in the cauſe, proof of the handwriting of the obligor was held ſufficient. By parity of reaſoning the ſame mode of proof ought to be received here; for the witneſs lives at *Riga*, and cannot be compelled to attend by any proceſs; he might equally refuſe to be examined if a commiſſion were ſent out; and that mode of examination has fallen into diſuſe from the heavy expence and difficulty attending

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(*a*) *Ante*, 5 vol. 371.

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it. Beſides, proof of the handwriting of the ſubſcribing witneſs is only a medium of proof of the handwriting of the contracting party; and as this inſtrument is not under the ſeal of the contracting party himſelf, but has it's force from his ſignature only, this proof is ſufficient. In the proof too of foreign inſtruments more latitude has been allowed than in general caſes between ſubject and ſubject. Even where the ſubſcribing witneſs, though a ſubject, had been abſent in the *Eaſt Indies* (*a*) for five years, Lord *Mansfield* held in *Coghlan* v. *Williamſon* (*b*) that proof of the obligor's handwriting and of his admiſſion of the debt was ſufficient. And upon a motion for entering a nonſuit the Court concurred with his Lordſhip, the point being given up by the defendant's counſel, upon the ground of his admiſſion of the debt.

Gibbs, *Heywood* Serjeant, and *Holroyd*, *contrà*, were ſtopped by the Court.

Lord KENYON, Ch. J. We ought not to ſuffer this point to be called in queſtion; it is too clear for diſcuſſion. I do not ſay that proof of the handwriting of the contracting party is not under any circumſtances ſufficient where there is a ſubſcribing witneſs; as if no intelligence can be obtained reſpecting the ſubſcribing witneſs after reaſonable inquiry has been made; but here the witneſs is a known perſon reſiding at *Riga*. Generally ſpeaking, every inſtrument, whether under ſeal or not, the execution of which is witneſſed, muſt be proved in the ſame manner, regularly by the witneſs himſelf if living; if dead by proving his handwriting; if reſiding abroad by ſending out a commiſſion to examine him, or at leaſt by proving his handwriting, which laſt indeed is a relaxation of the old rule, and admitted only of late years. I remember the caſe alluded to which was tried at Guildhall, where the ſubſcribing witneſs being domiciled in a foreign country Lord *Mansfield* permitted evidence to be given of his handwriting. That opinion was received with approbation at the time on account of the neceſſity and convenience of the caſe; and I myſelf have adopted it in caſes which have been tried before me (*c*). The ſame medium of proof has alſo been admitted

where

(*a*) *Vid.* 26 *Geo.* 3. *c.* 57. *ſ.* 38. by which deeds executed in the *Eaſt Indies* and atteſted by witneſſes there are made evidence on proof of the handwriting of the parties *and* of the witneſſes.

(*b*) *Dougl.* 93.

(*c*) *Wallis* v. *Delancey*, Sittings at *Weſtminſter*, 13th *Feb.* 1790, cor. Lord *Kenyon* — Debt on bond dated in 1774, which had been executed by the defendant at *New York* in *America* to the plaintiff, who was averred to be truſtee of Sir *Frederick Haldiman*. There were two witneſſes to the bond, and it was proved thus; evidence was given of the handwriting of *Rivington* one of the ſubſcribing witneſſes, who was in *America*. Objection was taken that this was not ſufficient without proving alſo the handwriting of the obligor; and Lord *Kenyon* being of that opinion, it was proved accordingly.

2d

where the ſubſcribing witneſs has been ſought for and could not be found, ſo as to furniſh a preſumption that he was dead. But the rule has never been relaxed further than theſe inſtances; and there is neither neceſſity nor convenience in doing ſo. The caſe of *Swire* v. *Bell* went on the ground that the ſubſcribing witneſs was intereſted at the time of the execution and alſo at the time of trial.

ASHHURST, J. of the ſame opinion.

GROSE, J. Where there is a ſubſcribing witneſs the parties thereby agree that the proof of their handwriting ſhall be made through that medium.

LAWRENCE, J. Even an acknowlegement by the obligor himſelf has been held not to be ſufficient evidence on the plea of non eſt factum (*a*).

Rule abſolute.

(*a*) *Abbot* v. *Plumbe, Dougl.* 215.

TYTE *againſt* GLODE and another Sheriff of MIDDLESEX.

Saturday, May 20th.

Coſts are due to the plaintiff who recovers treble damages in an action on 29 *Eliz. c.* 4. againſt the ſheriff for taking more than the fee allowed by that ſtatute on levying under an execution againſt the plaintiff's goods.

THIS was action on the 29 (*a*) *Eliz. c.* 4. againſt the ſheriff for treble damages for taking more upon a levy of execution upon the plaintiff's goods than the fees allowed by that act. The declaration after ſetting forth the neceſſary proceedings in the former ſuit (*b*) ſtated that "nevertheleſs the defendants not regarding their duty nor the ſtatute in ſuch caſe made and provided,

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(*a*) In 1 *Salk.* 331. it is ſaid that it appears by the Parliament Rolls to have paſſed in the 28 *Eliz.*

(*b*) *Vide* the form of ſuch declaration in *Woodgate* v. *Knatchbull, ante,* 2 vol. 148. and *King* v. *Marſack, ante,* 6 vol. 771.

2d Objection that the handwriting of *W. Moreton* the other ſubſcribing witneſs ſhould alſo be proved, and that he alſo was abroad or dead; otherwiſe non conſtat but he might have been ſubpœnaed here. Lord *Kenyon* thought that ſome evidence of that ſort was neceſſary. Whereupon the plaintiff proved that there had been a man of the name of *Moreton* who had lived as a clerk with *Rivington* the other ſubſcribing witneſs; but it could not be proved that his name was *William,* or that it was the handwriting of that *Moreton,* or that that *Moreton* might not now be in *England*; all which was urged by *Erſkine* againſt the admiſſion of the proof. But Lord *Kenyon* held it ſufficient; for this being the caſe of a foreign tranſaction, though perhaps the evidence was capable of being more perfect, yet it was ſufficient and reaſonable evidence to go to the jury at leaſt, unleſs it were rebutted by ſome evidence on the other ſide. The expence of ſending out a commiſſion would (he ſaid) in many caſes be more than the value of the ſum in diſpute.

“ received and took of the plaintiff for executing the ſaid execution *more or other conſideration and recompence than in the ſaid act is limited and appointed in that behalf*, *viz.* 15*s.* 6*d.* more than in the ſaid act is limited, whereby the plaintiff is endamaged and aggrieved to the amount of the ſaid 15*s.* 6*d.*; contrary to the form of the ſtatute” &c. The plaintiff obtained a verdict, and had judgment for his treble damages under the ſtatute, and the Maſter taxed coſts for him.

Lawes moved that the Maſter might review his taxation, contending that no coſts were due in this caſe under the ſtat. of *Glouceſter*(*a*), and none were given by the act of *Elizabeth*, on which the action was framed. The rule is laid down in *Pilfold*'s caſe 10 *Co.* 116. that where a man either before or by the ſtatute of *Glouceſter* could not recover damages, if a ſubſequent ſtatute in a new caſe give damages either ſingle double or treble, there the plaintiff ſhall not recover coſts, for the act creates and gives a recompence where none was given before. Now this is not an action for extortion for which damages might have been recovered before, but for taking more than the ſpecific recompence given by the ſubſequent ſtatute of *Elizabeth*. The caſes (*b*) which have been lately determined on this point were caſes in which general damages were recovered for injuries which the parties might have ſuſtained before the ſtatute of *Glouceſter*, though the particular remedies were given by ſubſequent ſtatutes: but the ſtatute of *Elizabeth* for the firſt time created a particular duty in the ſheriff not to take more than a certain fee, and gave a new remedy for the breach of it to the party grieved.

Lambe was to have ſhewn cauſe againſt this rule in the firſt inſtance: but

The Court were clearly of opinion that there was no foundation for the motion; for that the rule was eſtabliſhed in a variety of caſes, *Witham* v. *Hill* (*c*), *Jackſon* v. The Inhabitants of *Caleſworth*, *Ward* v. *Snell* (*d*), and *Creſwell* v. *Hoghton*, that where by any act ſince the ſtatute of *Glouceſter* an action is given to the *party grieved* he is entitled to coſts if he ſucceed, though he had no remedy before ſuch act. And therefore they

Refuſed the rule.

(*a*) 6 *Ed.* 1. *c.* 1.

(*b*) *Jackſon* v. The Inhabitants of *Caleſworth*, *ante*, 1 vol. 71. and *Creſwell* v. *Hoghton*, *ante*, 6 vol. 355.

(*c*) 2 *Wilſ.* 91.

(*d*) 1 *H. Bl. Rep.* 10.

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Marriott *againſt* Hampton.

Saturday, May 20th.

Where money has been paid by the plaintiff to the defendant under the compulſion of legal proceſs which is afterwards diſcovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

THE defendant formerly brought an action againſt the preſent plaintiff for goods ſold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to ſubmit and pay the money again, and he gave a cognovit for the coſts. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the ſum ſo wrongfully enforced in payment. But Lord *Kenyon* was of opinion at the trial that after the money had been paid under legal proceſs it could not be recovered back again, however unconſcientiouſly retained by the defendant, though the caſe of *Moſes* v. *Macfarlan*, 2 *Burr*. 1009, was referred to; and thereupon the plaintiff was nonſuited.

Gibbs now moved to ſet aſide the nonſuit and to grant a new trial; relying on a ſubſequent caſe of *Liveſay* v. *Rider*, *E.* 22 *Geo.* 3. *B. R.* where on a ſimilar motion the Court held ſuch an action maintainable. And he preſſed for the opinion of the Court in order that the queſtion might be ſettled.

Lord Kenyon, Ch. J. I am afraid of ſuch a precedent. If this action could be maintained I know not what cauſe of action could ever be at reſt. After a recovery by proceſs of law there muſt be an end of litigation, otherwiſe there would be no ſecurity for any perſon. I cannot therefore conſent even to grant a rule to ſhew cauſe, leſt it ſhould ſeem to imply a doubt. It often happens that new trials are applied for on the ground of evidence ſuppoſed to have been diſcovered after the trial; and they are as often refuſed: but this goes much further.

Ashhurst, J. of the ſame opinion.

Grose, J. It would tend to encourage the greateſt negligence if we were to open a door to parties to try their cauſes again becauſe they were not properly prepared the firſt time with their evidence. Of the general principle there can be no doubt; and though the laſt caſe cited ſeems to throw ſome ambiguity upon it, yet ſome of the poſitions there ſtated (*a*) are ſo entirely repugnant to every principle of law, that I have leſs difficulty in diſregarding the whole authority of it.

(*a*) Which his Lordſhip read from the note of it.

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Lawrence, J. If the caſe alluded to be law, it goes the length of eſtabliſhing this, that every ſpecies of evidence, which was omitted by accident to be brought forward at the trial, may ſtill be of avail in a new action to overhale the former judgment; which is too prepoſterous to be ſtated.

Rule refuſed.

Saturday, May 20th.

Harper *againſt* Carr.

A churchwarden taking a diſtreſs for a poor's rate under a warrant of magiſtrates is entitled to the protection of the 24 *G.* 2. *c.* 44., in having the magiſtrates made defendants with him in an action of treſpaſs. The granting of ſuch warrant by the magiſtrates is a judicial and not a miniſterial act; and they ought firſt to ſummon the party and hear what he has to ſay in his defence.

TRESPASS for ſeizing and carrying away a ſhip's anchor at *Liverpool.* It appeared at the trial before *Rooke* J. at the laſt aſſizes for *Lancaſter* that the defendant, who was a churchwarden, took the anchor in queſtion as a diſtreſs for non-payment of a poor rate under a warrant of magiſtrates which was produced. Whereupon it was contended on behalf of the defendant that this action could not be maintained againſt him alone, but that the magiſtrates under whoſe authority he had acted ought alſo to have been made defendants under the 24 *G.* 2. *c.* 44. by which it is enacted "that no action ſhall be brought againſt any conſtable, headborough, *or other officer*, &c. for any thing done in obedience to any warrant under the hand or ſeal of any juſtice of the peace, until demand in writing hath been made &c by the party intending to bring ſuch action &c of the peruſal and copy of ſuch warrant, and the ſame has been refuſed &c; and in caſe after ſuch demand and compliance therewith &c any action ſhall be brought againſt any ſuch conſtable headborough or other officer &c *without making the juſtices* who ſigned or ſealed the ſaid warrant *defendants*, that on producing or proving ſuch warrant at the trial of ſuch action the jury ſhall give their verdict for the defendant, notwithſtanding any defect of juriſdiction in ſuch juſtices &c." The learned Judge thought that a churchwarden diſtraining for a poor's rate was not within the protection of that ſtatute, and overruled the objection. The defendant then entered upon his defence, upon which many other queſtions aroſe, which are unneceſſary to be here ſtated as the judgment of the Court was confined to the objection firſt mentioned. The jury found a verdict for the plaintiff under the Judge's direction for the value of the diſtreſs, with leave to the defendant to move to enter a nonſuit if the Court thought the objection fatal.

Cockell,

Cockell, Serjt. accordingly on a former day in this term obtained a rule niſi for that purpoſe; ſaying that there was no diſtinction in this reſpect between a churchwarden acting under the warrant of magiſtrates in diſtraining for a poor-rate or under an order of removal. In all caſes he is in the ſituation of any other officer on whom a duty is thrown by law which he is bound to execute. He is not therefore in the ſituation of a party acting in his own cauſe; nor are the juſtices bound to grant the warrant of diſtreſs merely on his application: it is their duty to ſummon the party firſt, and hear what he has to ſay againſt it; and they muſt firſt ſatisfy themſelves that the rate has been regularly made and publiſhed, and a proper demand made upon the party. The Court lately refuſed to grant a mandamus to juſtices in *Cumberland* (*a*) to iſſue a warrant of diſtreſs before they had ſummoned the party and heard what he had to object. Beſides it appears from a review of the ſtatutes that the Legiſlature had this deſcription of officers particularly within their view in affording protection to thoſe who were charged with the execution of proceſs. The 7 *Jac.* 1. *c.* 5. firſt gave protection to "juſtices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, portreeves, conſtables, tythingmen, and collectors of ſubſidies and fifteenths." The 21 *Jac.* 1. *c.* 12., which enables officers to plead the general iſſue and give the ſpecial matter in evidence, expreſsly extends the remedy to "*churchwardens and overſeers of the poor*," "doing any thing touching their offices." Then the 24 *Geo.* 2. *c.* 44. *ſ.* 6., which requires the juſtice who granted the warrant to be joined with the officer who executed it, includes all officers generally who act under the warrant or order of a magiſtrate. Theſe ſtatutes being made in pari materiâ are to be conſtrued together; and the two former acts ſhew who are meant by the term *officers* in the laſt act. And he referred to the caſe of *Nutting* v. *Jackſon* (*b*), where it was expreſsly holden that an overſeer of the poor diſtraining for the poor's rate under the juſtices' warrant is within the protection of the act of *Geo.* 2.

Law, *Chambre*, *Heywood*, and *Scarlett*, now ſhewed cauſe againſt the rule; and relied on the caſe of *Milward* v. *Caffin* (*c*), as ſhewing that it was not neceſſary to join the magiſtrates in this action, and conſequently that the churchwarden was not within

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(*a*) *R.* v. *Benn* and another, *ante*, 6 vol. 198.

(*b*) *E.* 13 *Geo.* 3. *Bull. N. P.* 24.

(*c*) 2 *Blac. Rep.* 1330.

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the protection of the act of *Geo.* 2. on this occaſion. The ground on which the contrary doctrine is contended for is that magiſtrates have the ſame diſcretion to grant warrants in this as in other caſes: but it was holden otherwiſe in that caſe; for the Court there ſaid that the juſtices have only a ſpecial juriſdiction upon the application of the overſeer to enforce the payment of a tax, which he (the overſeer) is preſumed to have regularly made. This conſtruction is alſo warranted by the proviſions of the 43 *Eliz. c.* 2., which directs the churchwardens and overſeers to make the rate with the approbation of two juſtices, and that it ſhall be lawful for the churchwardens and overſeers by warrant from two juſtices to levy the aſſeſſment by diſtreſs. And by *ſ.* 19. in caſe any action ſhall be brought againſt the officers for taking the diſtreſs, they may either plead not guilty or juſtify and ſtate the truth of the caſe; and upon iſſue joined the whole matter ſhall be given in evidence; and upon verdict for the defendant or a nonſuit, the defendant ſhall recover treble damages by reaſon of the wrongful vexation. Now if the churchwardens and overſeers are within the act of *Geo.* 2. they can never recover their treble damages given to them by the ſtatute of *Elizabeth*, though they may have been wrongfully vexed; for ſuch damages are only given upon a hearing of the merits, but under the act of *Geo.* 2. the merits of their caſe can never be entered into; for they are entitled to an acquittal upon the mere production of the warrant. The Legiſlature themſelves ſeem to have explained by the other acts of parliament which have been mentioned that they did not intend to include "churchwardens and overſeers of the poor" within the words, "or other officer," in the ſtat. 24 *Geo.* 2. For the title of the ſtat. 7 *Jac.* 1. *c.* 5 is "an act for eaſe in pleading &c in actions &c. againſt juſtices mayor's conſtables &c. *and certain other his majeſty's officers*;" and the Legiſlature being aware that thoſe general words did not extend to churchwardens and overſeers of the poor found it neceſſary to include them by a ſpecial proviſion in the 21 *Jac.* 1. *c.* 12. Therefore the words "or other officer" following "conſtable headborough" &c muſt be taken only to mean other officers ejuſdem generis, namely, peace officers. Beſides, it is more reaſonable that the overſeers whoſe act in making the rate is to be enforced by the warrant ſhould try the legality of it at their own charge, than that they ſhould throw the onus of the litigation on the magiſtrates, who are mere formal parties, and have not competent means of informing them-

ſelves

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ſelves of the legality of the rate. It is no anſwer to ſay that they may and ought to ſummon the party before they grant a warrant of diſtreſs againſt him; for in this inſtance they act miniſterially; and the party may afterwards diſcover objections to the rate of which he was not apprized at the time: but the overſeers muſt know whether they have made a legal rate or not, and it is their own fault if they have not. In *R.* v. The Juſtices of *Middleſex* (*a*) the Court granted a mandamus to juſtices to ſign a warrant of diſtreſs for levying a poor-rate, although it was urged that it had been uſual to grant a ſummons firſt, which the Court thought not neceſſary, it not being required by the act. And Mr. J. *Foſter* put it on the ſame footing as the allowance of a rate, which is admitted to be an act merely miniſterial. So in a late caſe of the *King* v. The Juſtices of *Glouceſter* (*b*), upon a mandamus to grant a warrant of diſtreſs, the magiſtrates thinking that they had a diſcretion returned that they were of opinion that the place in reſpect of which the party was rated was not within their juriſdiction; but the Court quaſhed the return as inſufficient; and finally an iſſue was directed. The poor's rate being the act of the overſeers greatly diſtinguiſhes their caſe from that of conſtables or ſuch other officers who are mere inſtruments in executing the warrants of magiſtrates on other occaſions, and who have no diſcretion to judge of the propriety of the application on which the warrant iſſued, and cannot refuſe to execute it. Whereas an overſeer has both the opportunity of forming ſuch judgment in the firſt inſtance, and is not afterwards bound to execute the warrant if he is ſatisfied of the illegality of it: he is throughout the principal mover in the buſineſs. If the Court ſhould determine that ſuch officers are to be protected at the expence of the magiſtrates, it will load the latter with a burthenſome reſponſibility, and will render the former more negligent in their endeavours to make a proper rate, who alone have competent information upon the ſubject. This conſtruction will defeat the beneficial object of the act of *Geo.* 2., which was to protect mere miniſterial agents, and to throw the onus of defending the act complained of on the party who had the opportunity of exerciſing his judgment on the caſe, which in this inſtance is the churchwarden and not the magiſtrates.

(*a*) *E.* 19 *Geo.* 2. 1 *Conſt.* 207. *pl.* 208.

(*b*) The mandamus iſſued in *Hilary* term 1791; and the juſtices made a return in *Eaſter* term following, ſtating that it appeared to them that the lands rated did not lie within that part of the pariſh of St. *Nicholas* which was in the county of *Glouceſter*.

HARPER *againſt* CARR.

Lord KENYON, Ch. J. (ſtopping *Cockell* Serjt. and *Topping* in ſupport of the rule.) I will not enter into a conſideration of the other queſtions about the legality of the rate, the only queſtion here is whether or not we ſhould put the conſtruction on this very beneficial ſtatute that the Legiſlature intended it ſhould receive. The act provides that, when a warrant is granted to the inferior deſcriptions of mankind who cannot judge of the propriety of it, they ſhall not be haraſſed with actions for executing it, but that the magiſtrate who granted it ſhall bear the reſponſibility himſelf. It is objected however that the ſtatute does not extend to churchwardens and overſeers, but is confined to the officers of the peace: but if that be the meaning of the ſtatute all mankind have been acting under a miſtake ever ſince it paſſed; for it has always been extended to ſurveyors of the highways, who have an extenſive juriſdiction on the ſubject of the highways. In *Wilkes* v. Lord *Halifax* it was indeed decided that the act did not extend to one of the King's meſſengers, and there it was ſaid that it was confined to thoſe who were obliged to take upon them the execution of offices of this deſcription without any reward. Nor can it be doubted but that it extends to overſeers of the poor in ſome inſtances, e. g. in executing an order of removal. In one of the acts of parliament (*a*) the deſcription is "conſtables and certain *other his majeſty's officers*:" but in this ſtatute the latter expreſſion is dropped, and it ſpeaks of "conſtables, headboroughs, or other officers," acting in obedience to any juſtice's warrant. I will not now enter into an examination of the caſe of *Milward* v. *Caffin*, becauſe that was decided on the form of the action, a replevin, to which it was ruled that this ſtatute did not extend: had it not been for that deciſion I ſhould have thought that the act did extend to a replevin; and certainly convenience requires that it ſhould, otherwiſe it is in the plaintiff's power to evade the proviſions of the act by adopting a particular mode of proceeding which depends on his own choice. Perhaps however it may be ſhewn on examination that that caſe was rightly decided, whatever my doubts may have been about it. Then it was ſaid that juſtices of the peace act miniſterially in granting a warrant of diſtreſs for non-payment of a poor rate in the ſame manner as when they allow a rate, and a dictum of Mr. J. *Foſter* has been alluded to in ſupport of it: but it is obſervable that neither of the other

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(*a*) See the preamble to 7 *Jac.* 1. c. 5.

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three judges thought the two caſes alike; and I think that the caſe of allowing a poor-rate is the ſingle inſtance in which the juſtices act miniſterially; but there the allowance alone does not put the rate into a ſtate to be enforced, for it is ſtill open to an appeal by any perſon who thinks himſelf aggrieved. But in the inſtance of granting a warrant of diſtreſs the juſtices exerciſe a diſcretion after inquiring into the circumſtances of the caſe. It is an eſſential rule in the adminiſtration of juſtice that no man ſhall be puniſhed without being heard in his defence; the party muſt be ſummoned before a warrant of diſtreſs is granted, as we decided in *R.* v. *Benn;* and on that ſummons many circumſtances may appear to ſhew that a warrant of diſtreſs ought not to be granted. I will not even ſuggeſt what my opinion is reſpecting the validity of this rate, becauſe it is not neceſſary to the deciſion of this caſe: but I am very clearly of opinion, on the preliminary point, that the magiſtrates who granted the warrant ſhould have been made parties to the ſuit, and that all thoſe other ſteps ſhould have been taken that the ſtat. 24 *Geo.* 2. requires.

ASHHURST, J. This is a very wiſe proviſion made for the protection of all inferior officers acting under the warrant of a juſtice of the peace; and on this ground I am of opinion that the magiſtrates ought to have been made defendants in the cauſe. The caſe of *Nutting* v. *Jackſon* is a deciſion directly in point.

GROSE, J. I remember the caſe of *Nutting* v. *Jackſon*, which underwent a great deal of diſcuſſion, and the determination of which was ſatisfactory to every perſon who heard it. And that was not the firſt determination on the point; for Mr. *Lucas*, in argument, cited a caſe in 1770 before Lord Ch. Juſt. *Wilmot* who decided at niſi prius that an overſeer of the poor was an officer within the meaning of the ſtatute 24 *Geo.* 2. It is true that the Court of Common Pleas expreſſed a different opinion in *Milward* v. *Caffin:* but it is ſufficient to ſay of that caſe that it was determined on the form of the action, and that the attention of the Court was not neceſſarily called to this point as it was in the caſe of *Nutting* v. *Jackſon.* I think it would be miſchievous to overrule the caſe of *Nutting* v. *Jackſon*, which was a convenient and proper deciſion. Therefore, without repeating the reaſons already given by the Court, I am of opinion on the authority of that caſe, which cannot be diſtinguiſhed from the preſent, that the rule ſhould be made abſolute.

LAWRENCE,

LAWRENCE, J. The ground on which I doubted the authority of *Nutting* v. *Jackſon* when this motion was firſt made was that the magiſtrates in granting a warrant of diſtreſs act merely miniſterially; if they had no diſcretion on the ſubject it would be hard that they ſhould be bound to grant a warrant of diſtreſs which they thought illegal and afterwards diſcuſs the propriety of the rate at their own expence. And if they had no diſcretion in granting the warrant, I ſhould have doubted of that caſe. But the caſes now referred to ſhew that the juſtices do not act miniſterially. Beſides the ſtatute 43 *Eliz.* *c.* 2. requires a warrant ſigned by two juſtices to enable them to levy the money due, which would have been unneceſſary if the juſtices were not to exerciſe a diſcretion whether they ſhould grant or refuſe the warrant: that circumſtance, I think, ſhews that the Legiſlature did not intend that a warrant ſhould be granted as a matter of courſe, but that the juſtices ſhould firſt inquire into the merits of the caſe. The caſes cited ſhew that the party ought to be ſummoned before the magiſtrates before they grant a warrant of diſtreſs; and then they muſt exerciſe their own judgment in the ſame way that they do on the hearing of any other complaint. Then it ſeems to be immaterial in this reſpect whether the warrant be granted to the overſeer or to any other perſon. Conſidering therefore that ſuch a warrant is not granted as of courſe, and that this very point was decided in *Nutting* v. *Jackſon*, I think that the rule muſt be made abſolute.

Rule abſolute.

Tueſday, May 23d.

DOE on the Demiſe of W. NEVILLE *againſt* RIVERS and BRADLEY, Aſſignees of W. NEVILLE the Elder a Bankrupt.

Deviſe to *A.* and her heirs, and if ſhe died without iſſue, then ſhe was enabled to diſpoſe of the eſtate by will or deed; and for want of ſuch iſſue and direction &c. then to the deviſor's right heirs: *A.* who had iſſue took an eſtate tail.—Tenant in tail by leaſe and releaſe previous to her marriage conveyed to truſtees to the uſe of herſelf till the marriage, then to the huſband for life, then to herſelf for life, then to the firſt and other ſons of the marriage &c; tenant in tail died before the huſband, leaving a ſon; held that the huſband was not entitled to a life eſtate either under the ſettlement or as tenant by the curteſy.—A conveyance by leaſe and releaſe by tenant in tail conveys a baſe fee voidable by the entry of the iſſue in tail.

ON the trial of this ejectment at the laſt *Wincheſter* aſſizes a verdict was taken for the plaintiff, ſubject to the opinion of this Court on a caſe reſerved.

W. Fifield, being ſeiſed of the premiſes in queſtion, by will dated 3d of *May* 1766, after confirming his ſettlement, by which

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Quære how lease & release could ~~to~~ discontinue an estate tail?

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Doe dem. Neville againſt Rivers.

one part of this eſtate was ſettled on his wife *E. Fifield* for life, deviſed the reſt of the premiſes to his daughter and only child *Mary Fifield* on her attaining twenty-one, and to her heirs; and as to that part which was ſettled on his wife he deviſed the ſame to his ſaid daughter after the death of his widow; in caſe the widow ſhould die before the daughter attained twenty-one, then he willed that both parts of the eſtate ſhould go immediately to his daughter and her heirs for ever; but he willed that his wife ſhould hold and enjoy both parts until his daughter ſhould attain the age of twenty-one; and *in caſe his daughter ſhould die without iſſue*, then he empowered her to diſpoſe of the whole by will or any other inſtrument in writing atteſted by three witneſſes, as ſhe ſhould direct limit or appoint; and *for want of ſuch iſſue* and direction &c then that the ſame ſhould deſcend and go to his own right heirs. The deviſor his widow and daughter are ſince dead, the mother having ſurvived the daughter. The daughter married *W. Neville* the elder, by whom ſhe had one ſon, the leſſor of the plaintiff. But previous to her marriage ſhe, having attained the age of twenty-one and being in poſſeſſion of the unſettled part of this eſtate, by leaſe and releaſe dated the 2d and 3d of *Dec.* 1772 conveyed the whole of the premiſes in queſtion to truſtees to the uſe of herſelf and her heirs until the intended marriage, and from and immediately after the marriage to the uſe of *W. Neville* the elder and his aſſigns for his life, remainder to truſtees to ſupport contingent remainders, remainder to herſelf for life, remainder to the firſt and other ſons of the marriage in tail, with remainders over. *W. Neville* the elder is ſince become a bankrupt, and the defendants are his aſſignees.

Durnford for the plaintiff. Two queſtions ariſe in this caſe, one on the conſtruction of the will of 1766, the other on the effect of the marriage-ſettlement of *Mary Fifield* in *December* 1772. Firſt; *Mary Fifield* took only an eſtate-tail under her father's will in 1766. Though that part which was not ſettled on the deviſor's widow is at firſt deviſed to *Mary Fifield and her heirs*, it is manifeſt from the two clauſes at the concluſion of the will that the deviſor did not intend to give his daughter a fee, but that her children if ſhe had any ſhould take after her. And as to that part which was ſettled on the deviſor's wife for her life, it is only by the firſt deviſe given to the daughter for her life, no words of inheritance being there added: but the ſame two clauſes at the end of the will enlarge that deviſe into an eſtate-tail. So that

Lord Kenyon's [illegible] in Bradley v. Porter 3. Durnf. & Eaſt 145 & 145.

taking

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taking the two firſt deviſes of the two ſeparate parts of the eſtate and the two clauſes at the end of the will together, it is clear that the deviſor did not intend that his daughter ſhould have a greater eſtate than an eſtate-tail in both theſe parts. If not, the ſecond queſtion ariſes on the effect of the ſettlement made on the marriage of that deviſee. It is clear that a conveyance by leaſe and releaſe by a tenant in tail neither bars the iſſue in tail, ſtat. de donis (*a*), or works a diſcontinuance; *Lit. ſect.* 598. 600; *Co. Lit.* 328. *a.*; *Finch's Law* 190. But ſuch a conveyance paſſes a baſe fee, voidable by the iſſue in tail by entry. *Seymour*'s caſe, 10 *Co.* 95; *Machell* v. *Clarke*, 2 Ld. *Raym.* 779; *Doe* d. *Tyrrel* v. *Shilſon*, 3 *Burr.* 1703. So that the huſband of the tenant in tail, *W. Neville*, is not now entitled to a life-eſtate either under the ſettlement or as tenant by the curteſy. He cannot take under the ſettlement becauſe it was not competent to his wife to paſs the eſtate by ſuch a conveyance to the prejudice of her iſſue after her death. Nor can he take as tenant by the curteſy, becauſe the inſtant the marriage took effect the eſtate was veſted in the huſband during the joint lives of himſelf and his wife, and conſequently there never was any one moment during the coverture when the wife was ſeiſed of an eſtate-tail *in poſſeſſion*, which is neceſſary in order to make the huſband tenant by the curteſy. *Co. Lit.* 29. *a.* And with regard to that part of the eſtate which was ſettled on the deviſor's wife, it was only deviſed to the daughter ſubject to her mother's life-eſtate in it: now as it appears by the caſe that the mother ſurvived the daughter, this part never was veſted in the daughter in poſſeſſion; and at all events therefore as to this the huſband is not entitled by the curteſy.

Burrough, who was to have argued for the defendants, candidly acknowledged that the two points were againſt him; firſt, that the daughter took an eſtate-tail only, and that the ſecond point was now too well eſtabliſhed by the authorities to be ſhaken. And

The Court, being of that opinion, ordered the

Poſtea to be delivered to the plaintiff.

(*a*) 13 *Ed.* 1. *c.* 1.

1797.

Tueſday, May 23d.

SEDGWORTH *againſt* OVEREND and three others.

If one of two part-owners of a chattel ſue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards ſue alone, and the defendant cannot plead in abatement to ſuch action.

THIS was an action on the caſe brought by the plaintiff, who was deſcribed as the owner of three-fourth parts of a ſhip *The Sally*, againſt the defendants, the owners of another ſhip, for ſo negligently careleſsly and unſkilfully navigating their ſhip that ſhe ran foul of the plaintiff's and ſunk her.

The defendants pleaded in abatement that the plaintiff at the time of the injury and loſs had no intereſt or property in the ſhip *Sally* unleſs jointly and undividedly with one *J. Addiſon*, who is ſtill alive &c, wherefore inaſmuch as *J. Addiſon* is not named in the bill the defendants prayed that it might be quaſhed.

The plaintiff replied that at the time of the injury and loſs *J. Addiſon* was owner of one-fourth part of the ſhip *Sally*, and the plaintiff was then owner of the remaining three-fourth parts; that after the injury and loſs and before the commencement of this ſuit, to wit, in *Hilary* term 35 *Geo.* 3. *Addiſon* impleaded the defendants for the damage ſuſtained by him as owner of the ſaid one-fourth part, and in *Trinity* term 36 *Geo.* 3. recovered againſt them 472*l.* damages &c.

To this replication the defendants demurred generally.

Marryat in ſupport of the demurrer. The plea in abatement is good, and the matter diſcloſed in the replication does not vary the caſe in favor of the plaintiff. It is a clear and eſtabliſhed rule that when an action is brought for an injury done to an entire and indiviſible chattel all the owners of that chattel muſt be joined. The plaintiff by his replication attempts to take this caſe out of the general rule and to ſhew that he cannot have a better writ becauſe one of the part-owners of his ſhip has already ſued the defendant and recovered damages: but in anſwer to that it muſt be remembered that the parties who have the *legal* title to any thing muſt join in an action to recover damages for an injury done to that thing, whether they be or be not entitled to the beneficial intereſt. It is ſo in the caſe of executors, ſurviving partners, truſtees, bankrupts, and the aſſignors of a choſe in action; *Winch* v. *Keeley*, *ante*, 1 vol. 619. And it is peculiarly neceſſary that the general rule ſhould be applied to this caſe; for where an injury is done to a ſhip of which there are many joint owners, permitting one alone to ſue for his ſhare of the damage will not only tend to a multiplicity of actions, but it will alſo enable all the partners to become witneſſes for each other in their reſpective ſuits. Without controverting the authority of the caſe of *Addiſon* v. *Overend* (*a*), it does not follow, becauſe judgment was properly given againſt the defendants in that caſe on account of their omitting to plead in abatement, that therefore this action by another joint owner can be maintained where the defendants have pleaded in abatement. Here it appears on the record that the legal title to the ſhip, for the injury done to which this action is brought, is veſted in two joint owners one of whom only ſues; and therefore the action cannot be maintained in it's preſent form.

Giles contrà was ſtopped by the Court.

Lord KENYON, Ch. J. I am clearly of opinion that the plaintiff is entitled to judgment. The caſe is ſhortly this; there were two perſons owners of a ſhip in unequal proportions, *Addiſon* being the owner of a fourth part, and the plaintiff of the remaining three-fourths; the former brought his action againſt the defendants, the owners of another veſſel, for wrongfully running down his ſhip, and we decided in that caſe that though the defendants might have pleaded in abatement that another perſon ought to have been joined with the plaintiff, yet as the defendants omitted to put in ſuch a plea the plaintiff was entitled to recover; and in that caſe the plaintiff had judgment and obtained a full ſatisfaction for all the damage that he had ſuſtained to his ſhare of the ſhip. But that did not ſatisfy the whole juſtice of the caſe, the preſent plaintiff being the owner of three-fourths of the ſhip; he now brings his action for the injury done to his ſhare, to which the defendants have pleaded that at the time when the injury was done there was another owner of the ſhip who ought to have ſued jointly with the plaintiff; the plaintiff has ſtated in his replication the proceedings in the former action to ſhew that the plaintiff in that action has already received a ſatisfaction. And the queſtion now is, Whether that perſon, who has obtained complete ſatisfaction for the damage which he ſuſtained, ought to have ſued as a co-plaintiff in this action? It is ſaid that he ought to have been a party, becauſe he is a truſtee for this plaintiff: but that is not correct; they are tenants in common of this ſhip. Then it was urged that the owners by not ſuing jointly will haraſs the defendants by bringing ſeveral actions inſtead of one: but to

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(*a*) *Ante*, 6 vol. 766.

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prevent multiplicity of actions the defendants had an opportunity of taking this objection in the former action; and if they had availed themſelves of it at the proper ſeaſon they would not have been haraſſed with different actions. I do not ſee for what good purpoſe the other part-owner ought to have joined in bringing this action; having already received a ſatisfaction himſelf, he could not be entitled to any part of the damages to be recovered in this action, and he is not a truſtee for this plaintiff. Therefore on the grounds of law reaſon and juſtice I think that this plea ought not to have been put in, and that the replication gives a full anſwer to it.

Ashhurst, J. It would be a diſgrace to our law to determine that *Addiſon* ought to have been joined in bringing this action; for it appears that he has already aſſerted his right and has recovered adequate damages for the injury that he ſuſtained in reſpect of his ſhare. The objection made by the defendant in this action is ſo contrary to common ſenſe that even without any authority I ſhould have thought it could not have been ſupported. But the caſe of *Nelthorpe* v. *Dorrington* (*a*), which was cited in *Addiſon* v. *Overend*, is in ſome degree an authority againſt the defendants; for there it was decided that two, out of three, joint owners might recover in trover; it is indeed added as a reaſon, "becauſe the defendant had not pleaded in abatement." But if it be competent to one part-owner to recover for his ſhare ſeparately, there is no reaſon why this plaintiff ſhould not recover in this action. The defendants might have pleaded in abatement to the firſt action, which would have ſaved them the expence of this action: but they omitted to do that at the proper time; and now by their demurrer to this replication they admit the truth of the facts contained in it.

Grose, J. The defendants' objection tends to ſhew that if one part-owner recover for the damage done to his ſhare, the other part-owners ſhall never recover a ſatisfaction for the injury done to theirs: but that can never be ſupported. This point, how far one part-owner can recover when the defendant does not plead in abatement, was diſcuſſed in *Addiſon* v. *Overend*, where we decided on the authority of ſeveral caſes that if the defendant does not plead in abatement, he cannot afterwards object: but that is no reaſon why the other part-owner ſhould have no remedy for the injury

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(*a*) 2 *Lev.* 113.

injury done to his ſhare of the property; he could not plead in abatement in the firſt action.

Lawrence, J. There is no objection to an action being brought by one tenant in common for an injury of this kind, if the defendant do not object to it on his own account. It is ſettled in a variety of caſes that one tenant in common may recover for the injury done to his ſhare of the property. Then the defendants, not having pleaded in abatement in the firſt action, cannot now make this objection; by omitting to plead in abatement then, they aſſented to the ſeverance of the actions. There might have been greater weight in this objection if there had been ſeveral remaining owners and only one of them had ſued: but here the whole remaining intereſt in the ſhip is veſted in this plaintiff; however if there had been ſeveral remaining part-owners, I do not think that the defendants could ever have objected to the ſeverance of the actions after they had omitted to plead in abatement in the firſt action.

Judgment for the plaintiff.

Thurſday, May 16th.

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A doctor of phyſic, who has been licenſed by the college of phyſicians to practiſe phyſic in *London* and within ſeven miles, cannot claim as a matter of right to be examined by the college in order to his being admitted a fellow of the college. The college, who have power by their charter (confirmed by act of parliament) to make bye-laws, have made bye-laws reſpecting the qualifications of perſons to be admitted into the college: by them it is ordained that no perſon ſhall be admitted into the claſs of candidates before admiſſion into the college, unleſs he has taken a degree of M. D. at *Oxford*, *Cambridge*, or *Dublin*; except in two caſes;—in one of thoſe caſes, the preſident may propoſe once in every other year a doctor of phyſic of a certain ſtanding, and if he be approved by the college he may be admitted a fellow;—in the other, any fellow may propoſe a doctor of phyſic of a certain age and ſtanding, and if approved at certain meetings he may be admitted a fellow.—Ruled that theſe were reaſonable bye-laws.

This was a rule calling on the preſident and college or commonalty of phyſic in *London* to ſhew cauſe why a mandamus ſhould not iſſue, commanding them to examine *C. Stanger*, M. D. as to his qualification and fitneſs to be admitted into the ſaid corporation as a member or fellow thereof.

By ſtat. 3 *Hen.* 8. *c.* 11. it is enacted that no perſon within the city of *London* or within ſeven miles thereof ſhall take upon him to exerciſe as a phyſician, except he ſhall firſt be examined approved and admitted by the Biſhop of *London* or by the Dean of St. *Paul*'s for the time being, calling to him or them four doctors of phyſic; with a proviſo that the act ſhall not be pre-

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udicial to the univerſities of *Oxford* or *Cambridge* or to any privileges granted to them. King *Henry* Eighth afterwards, in the tenth year of his reign, by charter incorporated the college of phyſicians: after reciting the miſchiefs that had ariſen to the public from the practice of unſkilful and ignorant men, and his will "Collegium perpetuum doctorum et gravium virorum, qui medicinam in urbe noſtrâ Londino et ſuburbibus intraque ſeptem millia paſſuum ab eâ urbe quaquaverſus publicè exerceant, inſtitui," he incorporated them thus "*J. Chambre*, *T. Linacre*, *F. de Victoria*, *N. Halſewel*, *J. Franciſco*, and *R. Yaxley* medicis conceſſimus quod ipſi *omneſque homines ejuſdem facultatis de et in civitate prædictâ* ſint in re et nomine unum corpus et communitas perpetua ſive collegium perpetuum." Then power is given to the college to elect annually a preſident of the college, "ad ſupervidendum recognoſcendum et gubernandum pro illo anno collegium ſive communitatem *et omnes homines ejuſdem facultatis* et negotia eorundem." The preſident and college are then authoriſed to make bye-laws "pro ſalubri gubernatione ſuperviſu et correctione collegii ſeu communitatis *et omnium hominum eandem facultatem in dictâ civitate* ſeu per ſeptem milliaria in circuitu ejuſdem civitatis exercentium &c." It then directs that no perſon ſhall practiſe phyſic in *London* or within ſeven miles thereof "niſi ad hoc per dictum preſidentem et communitatem admiſſus ſit" &c. And it gives the preſident and the college power to elect annually four perſons (now called cenſors) "qui habeant ſuperviſum et ſcrutinium correctionem et gubernationem omnium et ſingulorum dictæ civitatis medicorum utentium facultate medicinæ in eâdem civitate, ac aliorum medicorum forinſecorum quorumcumque facultatem illam medicinæ aliquo modo frequentantium et utentium infra eandem civitatem et ſuburbia ejuſdem ſive intra ſeptem milliaria in circuitu ejuſdem civitatis" &c. And it contains an exemption from ſerving on juries thus; "quod nec preſidens nec aliquis de collegio prædicto medicorum, nec ſucceſſores ſui, *nec eorum aliquis exercens facultatem illam ſummoneantur*" &c. The ſtat. 14 and 15 *Hen.* 8. *c.* 5., after reciting the above charter, and the expediency of providing that no perſon of the ſaid politic body and commonalty ſhould be ſuffered to exerciſe and practiſe phyſic but only thoſe who were "profound ſad and diſcrete groundly learned and deeply ſtudied in phyſic," confirmed the charter, and enacted that the ſix perſons therein named chooſing to them two more of the commonalty ſhould thenceforth be called the Elects,

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who ſhould annually chooſe a preſident of the ſaid commonalty; with power in caſe of the death of one of the elects to the ſurvivors of the eight to elect another; and it enacted that no perſon ſhould be ſuffered to practiſe phyſic through *England* until he ſhould be examined by the preſident and three of the elects, and have from the preſident and three of the elects letters teſtimonial of their examination, "except he ſhould be a graduate of *Oxford* or *Cambridge*, who had accompliſhed all things for his form without any grace."

Dr. *Stanger*, after referring to the above ſtatutes and charter, ſtated in his affidavit that in 1783 he took a degree of doctor of phyſic at *Edinburgh* after a reſidence there for three years, and after having ſtudied phyſic there and at other places for many years; that afterwards he went abroad to *France*, *Italy*, and *Germany*, and ſtudied phyſic there for ſeveral years more. That in 1789 he obtained a licence from the college of phyſicians here in the uſual way to practiſe in *London* and within ſeven miles thereof, and that he has practiſed ever ſince. That in *June* 1796 he applied to the preſident and college at their general meeting to be admitted by them to be a member of their corporation, ſubmitting himſelf to be previouſly examined by them concerning his qualification and fitneſs to be admitted a member of the corporation, which the college refuſed. Dr. *Stanger* alſo added in his affidavit that he was duly qualified and fit to be admitted a member of the college.

The affidavits in anſwer to the rule diſcloſed the following (among other) facts. For two hundred years paſt there have been three claſſes of perſons practiſing phyſic in *London* and ſeven miles round; the fellows; candidates, perſons deſirous of becoming members and who have been examined and approved by the preſident and cenſors to be candidates for election into the ſociety or fellowſhip; and the licentiates, who may practiſe as fully in all reſpects as fellows and have the ſame benefits and advantages. Various bye-laws have been made by the college reſpecting the qualifications of perſons to be admitted fellows; one of them ſo long ago as 1637, by which it was ordained that no perſon ſhould be admitted a fellow unleſs he had performed all his exerciſes and diſputations in one of our univerſities without diſpenſation, and which has continued ever ſince with ſome little alterations. To prevent any miſtake ariſing from the words "aliquâ Britanniæ Academiâ" in ſome of the bye-laws reſpecting this qualification, an

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an explanatory bye law was made in 1751, in which it was declared that the meaning of the words was that no perſon ſhould be admitted who was not a Doctor of Phyſic of *Oxford* or *Cambridge*. The bye laws of the college have been reviſed and altered ſince the year 1768. By thoſe now in exiſtence no perſon can be admitted a fellow unleſs he has been a candidate for a year, except in certain caſes hereafter mentioned. No perſon can be admitted into the claſs of candidates unleſs he has been created a Doctor of Phyſic in the univerſity of *Oxford* or *Cambridge*, or unleſs he has obtained the ſame degree in the univerſity of *Dublin* and has been incorporated into one of the univerſities of *Oxford* or *Cambridge*; nor can any ſuch perſon be admitted into the claſs of candidates until after he has been examined as to his knowledge of phyſic in three of the greater or leſſer meetings (called the comitia majora and comitia minora) of the college. After a perſon has been a candidate for a year, he may be propoſed by the preſident at one of the greater meetings and admitted a fellow, if the majority of fellows conſent, without further examination. But by two other bye laws perſons not having the above qualifications may be propoſed in one of two ways; by one, the preſident is enabled once in every other year at the comitia minora to propoſe one licentiate of ten years ſtanding, who may (if the major part of the comitia minora conſent) be propoſed by the preſident at the next comitia majora to be elected a fellow, and if the majority of fellows then preſent conſent, he may then be admitted a fellow. By the other, any one of the fellows may propoſe any licentiate, of ſeven years ſtanding and of the age of 36, in the comitia majora to be examined; if the major part of the fellows conſent, ſuch licentiate may be examined by the preſident or vice preſident and cenſors, and if approved by the major part of the fellows then preſent he may be propoſed at the next comitia majora to be a fellow, and admitted if the majority of the fellows then preſent conſent. The ordinary greater meetings (comitia majora) are holden four times a year, and conſiſt of the preſident or vice preſident and ten fellows at leaſt. The ordinary leſſer meetings, (comitia minora,) conſiſting of the preſident or vice preſident regiſtrar and cenſors of the college, are holden once a month. A letter was alſo inſerted in the affidavits written by King *Charles* the Second to the college in 1674, in which he ſignified his pleaſure and directed the college not to admit any perſon who had not had his education in either of

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our univerſities of *Oxford* or *Cambridge*: but it was admitted in the argument that no notice could legally be taken of this letter. It was alſo ſtated in the affidavits that Dr. *Stanger*, when he was licenſed, gave his faith or promiſe to the college that he would obſerve the ſtatutes of the college &c in the uſual mode.

Adair Serjt., *Law*, *Chambre*, and *Chriſtian*, argued in ſupport of the rule; and

Erſkine, *Gibbs*, *Dampier*, and *Warren*, againſt it.

The caſe was argued very much at length on three ſeveral days: but it is unneceſſary to give a detail of the arguments, as the Court in giving their opinions went into them. The points inſiſted upon by the counſel in ſupport of the rule were theſe; 1ſt. That under the general words of the charter "omnes homines ejuſdem facultatis," &c. Dr. *Stanger*, who came within that deſcription by his licenſe, had an inchoate right, which authoriſed him to tender himſelf to the college for examination in order that he might be admitted, if on examination the preſident and college thought him qualified; though they admitted that the preſident and college were the ſole judges of his fitneſs. And they referred to the ſeveral dicta of Lord *Mansfield* and *Aſton* J. in *R.* v. Dr. *Aſkew* and others, 4 *Burr.* 2196; 2202; 2193; 2202. Secondly, That the bye laws requiring an education at either of our univerſities or at *Dublin* were illegal and void, on grounds of public policy, and alſo on the ground that they ſuperadded a qualification not required by the charter, 4 *Burr.* 2198, 9; 2203, 4; and that it narrowed the number of the eligible; *R.* v. *Spencer*, 3 *Burr.* 1827; and *R.* v. *Cutbuſh*, 4 *Burr.* 2204.

On the other hand it was inſiſted, 1ſt, That Dr. *Stanger* had no *right* to be examined in order to be admitted a fellow, either as a licentiate, Dr. *Archer*'s caſe, 4 *Burr.* 2203; or as coming within the deſcription "omnes homines ejuſdem facultatis" &c; but that the election into that body was a mere matter of grant or favor; for that the charter evidently marked out two deſcriptions of perſons, the members of the college, (the fellows) and all thoſe who practiſed phyſic in *London* or within ſeven miles thereof, that the former were to ſuperintend the latter; and that if the latter had alſo a right to be admitted fellows the diſtinction between the governors and the governed would be deſtroyed, and the very object of the charter and act of parliament, in giving to the fellows the ſuperintendance of the others prac-

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tiſing phyſic in and about *London*, would be defeated;—obſerving that the uſage for a long period was in favor of this conſtruction. 2dly., That Dr. *Stanger*, by giving his faith when he received his licenſe in 1789, was eſtopped to object to the bye laws. But this point was abandoned in the courſe of the argument; it being conſidered that he was only bound to obſerve the bye laws of the college that were not illegal. 3dly, That the bye laws were neither againſt ſound policy or law; and inſtances were alluded to of degrees taken in either of our univerſities giving privileges to the perſons taking them in the other profeſſions. And the counſel obſerved that the not having taken a degree in one of our univerſities was not an abſolute bar to any perſon becoming a fellow of the college, there being two modes by which he might gain admiſſion without that qualification.

Lord Kenyon, Ch. J. If in deciding this caſe it were neceſſary for us to anſwer all the arguments that have been urged at the bar, I ſhould have deſired further time to conſider of the ſubject; but as the grounds on which I am warranted to determine the caſe lie in a very narrow compaſs, and as I have formed my opinion upon it, I wiſh to put the queſtion at reſt now. By what fatality it has happened that almoſt ever ſince this charter was granted this learned body have been in a ſtate of litigation I know not; and I cannot but lament that the learned Judges in deciding the caſes reported in *Burrow* did not confine themſelves to the points immediately before them, and dropped hints that perhaps have invited litigation; though indeed I cannot ſee what theſe parties are contending for that is worth the expence and anxiety attending this litigation. The public already have the benefit of the aſſiſtance of the licentiates; and their emoluments, the fair fruits of their education and advice, are juſt the ſame as thoſe that the fellows of the college receive. We have however been preſſed with the authority of thoſe who have preceded us here: no perſon can have a greater veneration for thoſe characters than I have; and if this point had been decided by them, I ſhould have thought myſelf bound by their deciſion. But the caſes are unlike. The principal ground on which it was ſaid in 4 *Burr.* 2199. that the bye laws of the college were bad was, that "they interfered with their exerciſing their own judgment, and prevented them from receiving into their body perſons known or thought by them to be really fit and qualified;" and if I had found that that objection exiſted in this caſe, I ſhould have thought it fatal: but

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but in the very ſentence in which Lord *Mansfield* expreſſed himſelf as above, he added "ſuch of them indeed as only require a proper education and a ſufficient degree of ſkill and qualification may be ſtill retained." Two univerſities have been founded in this country, amply endowed and furniſhed with profeſſors in the different ſciences; and I ſhould be ſorry that thoſe who have been educated at either of them ſhould undervalue the benefits of ſuch an education.

In this caſe it is admitted that a licentiate does not *de facto* become a fellow of the college: it is admitted that he muſt be firſt examined, and that thoſe who are called the College of Phyſicians are to judge of his fitneſs. It ſeems that the appeal here is rather made *ad verecundiam*, and that Dr. *Stanger* could not be rejected if he were examined. If the college are not judges of the fitneſs of the perſon examined, I do not know who is. Then is this a reaſonable teſt of the fitneſs of the party? poſſibly they might have framed a better, though I do not ſay that they could; but the queſtion here is whether this is a reaſonable bye law? according to the concurrent opinions of all mankind it is. The Legiſlature have conſidered that perſons who have taken degrees in our univerſities are entitled to certain privileges in the church. So if we look into our own profeſſion, thoſe who have been educated at our univerſities have particular privileges; and though the inns of court are not corporations, yet their regulations ſhew that this has been conſidered as reaſonable. It is not that a perſon becomes qualified from keeping his commons within the walls of the inns of court or the univerſities, but living with thoſe of the profeſſion will probably advance him in the knowledge of that profeſſion for which he is a candidate. Again in the civil law; however competent any particular individual may be from extraordinary endowments or the exertion of ſuperior talents, he muſt firſt take his degrees at one of our univerſities, and afterwards continue a year in a ſtate of probation before he can practiſe. Thoſe regulations that are adapted to the common race of men are the beſt: it does not follow that all inſtitutions calculated for the ordinary claſſes of men are to be proſtrated merely becauſe they ſtand in the way of ſome few individuals of ſuperior talents. Then the queſtion is whether this is a reaſonable bye law that requires a degree to be taken at one of our univerſities, which in general is ſuppoſed to be conferred as a reward for talents and learning.

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learning. If indeed this had been a ſine qua non, and it had operated as a total excluſion of every other mode of gaining acceſs to the college, it would have been a bad bye-law: but theſe bye-laws point out other modes of gaining admiſſion into the college. If Dr. *Stanger* has all thoſe requiſites that qualify a perſon for that high ſtation, any one of the fellows may now propoſe him; he may apply to the honourable feelings of the college, to the very ſame tribunal to which this mandamus (if it were granted) would refer him; for in all events he muſt ſubmit to their examination and determination. In the profeſſion of the church, we find that the biſhops inſiſt on having a teſtimonial of the perſon to be ordained ſigned by a certain number of clergymen; and though the biſhops themſelves may have the power of judging of the fitneſs of the perſon to be ordained, it was never doubted but that this was one reaſonable teſt of fitneſs even before examination: it is a teſt to regulate their own conduct. So here I think that this is a reaſonable teſt. Therefore on this ſhort ground, without entering into any of the other topics that have been argued, I am of opinion that theſe are good and reaſonable bye-laws, and that we are bound to refuſe the writ.

Ashhurst, J. Though this matter has taken a conſiderable time in the argument, it is now reduced to a narrow compaſs. The counſel who have argued for the iſſuing of the mandamus do not contend that a licentiate, as ſuch, does ipſo facto become a member or a fellow of the college: they only ſay that any man who is fit in learning and morals has a right to offer himſelf for examination, without any ſuperadded qualification; and therefore that the bye-law requiring "that every licentiate, in order to entitle him to offer himſelf for examination, ſhall be a doctor of one of the two univerſities in *England* or that of *Dublin*," is a void bye-law. It is not denied by the counſel who have argued for the rule that the corporation have the right of making bye-laws for the regulation of their own body. And Lord *Mansfield*, on whoſe authority they ground themſelves as in their favour, ſaid in 4 *Burr*. 2199. "that ſuch bye-laws as only require a proper "education and a ſufficient degree of ſkill and qualification may "be ſtill retained; that there can be no objection to cautions of "this ſort; and the rather if it be true that there are ſome "amongſt the licentiates unfit to be received into any ſociety."

This

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This brings it then to the queſtion, whether the bye-law now under diſcuſſion is or is not to be conſidered as a bye-law of regulation. It does appear to me that in order to enſure a proper education and a competence in learning, there cannot be a more likely method than the having ſpent fourteen years in one of our learned univerſities, and, after having been examined by perſons competent to the ſubject, having been admitted to a doctor's degree. This it ſhould ſeem would prevent in limine the danger of that happening, which Lord *Mansfield* complains of, namely, of perſons being admitted amongſt the licentiates unfit to be received into that ſociety. Indeed the Legiſlature ſo long ago as the paſſing of the act of the 14 and 15 *Henry* 8. ſeemed to ſhew their own opinion how much ſtreſs ought to be laid on ſuch a kind of teſt; for there, in ſpeaking of country phyſicians, the act ſays, "that no perſon ſhall be ſuffered to exerciſe or practiſe in phyſic through *England* until ſuch time as he be examined in *London* by the preſident and three elects, and have from them letters teſtimonial of their approving and examination:" but then the act goes on with this exception (viz.) "unleſs he be a graduate of *Oxford* or *Cambridge*, which hath accompliſhed all things for his form without any grace." This ſhews the opinion of the legiſlative body of that day; and the college might think it a very fit model for their imitation in the formation of the bye-law now under diſcuſſion, and that it would prevent them from having their time too much broken in upon by improper applications for examination. I would not be thought to infer that the gentleman now applying is in any degree deficient either in learning or education: but general laws cannot give way to particular caſes; and as this law has been of ſome ſtanding, we muſt ſuppoſe it has been found to be attended with general convenience, and therefore it ſhould be abided by. I therefore concur in the opinion that the rule for a mandamus ſhould be diſcharged.

Grose, J. This being a motion for a mandamus to a body incorporated by charter, we muſt ſee that we are authoriſed by the charter or the bye-laws to grant the application. On examining the charter, which was confirmed by act of parliament, we find that there was a ſelect body of eight including the preſident, and an indefinite number of the commonalty. The election of the preſident

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ſident is to be made annually by the college; ſo alſo is the election of the four cenſors. The intention of the Crown was to put an end to the miſchiefs occaſioned by the ignorance of the unſkilful practitioners; and for that purpoſe this corporation was created, with power of making bye-laws, of admitting ſkilful perſons to practiſe phyſic, and of preventing all others practiſing: the great object was to admit only thoſe to practiſe phyſic who were (to uſe the language of the act) "profound ſad and diſcreet, groundedly learned and deeply ſtudied in phyſic." How or when the fellows are to be choſen or admitted is not directed by the charter; it is left to the diſcretion of the perſons named in the charter under the general power given to them of perpetuating themſelves and of making bye-laws. The charter is therefore ſilent both as to the election of fellows, and as to the examination of them before election: but the examination is incident to the power of election. The charter being ſilent on theſe heads, and the college having the power of making bye-laws, they have made bye-laws to aſcertain a criterion of fitneſs of future candidates, by pointing out in ſome caſes the mode of their education, in others the perſons by whom they were to be propoſed as candidates. One of theſe bye-laws is objected to as illegal, becauſe it requires a degree to be taken at one of our univerſities, which (it is contended) is ſuperadding a qualification to thoſe required by the charter: but I think it is only aſcertaining a criterion of fitneſs as has been done moſt properly in other profeſſions in caſes alluded to both at the bar and bench. Then it is ſaid that a licentiate has an inchoate right: if by that Dr. *Stanger*'s counſel mean that he has one qualification which when added to others may give him a right of admiſſion, I agree with them; but the college are to judge of the other qualifications: if by this inchoate right they mean any thing more, I diſſent from them. It is admitted by this application that the college have a right to inſiſt on an examination; and upon what ground? as a teſt of fitneſs—but though this right is not expreſsly given to them by the charter, nor is there a word denoting any obligation either to admit or examine, it is incident to their power of judging who is fit to be admitted. That Lord *Mansfield* thought that they have ſuch a right incidentally is clear from what fell from him in Dr. *Aſkew*'s caſe, in which he ſaid "It is true that the judgment and diſcretion of determining upon this ſkill ability learning and ſufficiency to exerciſe and practiſe this profeſſion is truſted to the college of phyſicians: and this Court will not take it from them

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in the due and proper exerciſe of it." The ſame power that authoriſes them to judge of fitneſs alſo authoriſes them to regulate the mode by which they ſhall judge. They think, of which they are much better judges than we can be, that every man who is to be a candidate ought either to have taken his degree at one of our univerſities or in *Dublin*, or ſhall be propoſed by one fellow, or by the preſident. The bye-laws requiring this do not appear to me unreaſonable or inconſiſtent with the charter any more than requiring a particular mode of education, and in the caſe ſo often alluded to Lord *Mansfield* thought ſuch bye-laws were good; for when he recommended it to the college to reviſe their bye-laws, he ſaid "Such of them indeed as only required a proper education and a ſufficient degree of ſkill and qualification may be ſtill retained." In conſequence of that opinion the college have reviewed and altered their bye-laws, requiring in ſome caſes an education at either of our univerſities or at *Dublin*, in others permitting a nomination of perſons as fit to be examined by men whom they deem worthy of ſuch a truſt, conſidering ſuch degree and nomination merely as teſts of the perſon taking it or named having ſkill and learning and being fit to be examined. And in making theſe bye-laws I think that the college have ſhewn a due attention to diſcharge their duty to the public and to attain the ends of their inſtitution. Therefore I concur in the opinion already given that this rule ought to be diſcharged.

Lawrence, J. This is an application for a mandamus to compel the College of Phyſicians to examine Dr. *Stanger* in order that he may be admitted a fellow; and the foundation of the application is that he has been admitted to the practiſe of phyſic and is one of the homines facultatis within the meaning of the charter; which (it is ſaid) gives him a right to admiſſion, if on examination he ſhall be found fit; and that all the bye-laws militating againſt ſuch right are illegal. His counſel have been under the neceſſity of inſiſting on the licence giving him a right to examination; for if the being admitted a member of the body be matter of election, it is immaterial whether the bye-laws be good or bad. It ſeems to me that the inſufficiency of the proviſions of the ſtatute 3 *Hen.* 8. probably gave riſe to this charter; the object of which was to eſtabliſh a better mode of determining who were proper perſons to be licenſed to practiſe phyſic, and to prevent the practice of ignorant empirics; and if ſo, it was not neceſſary that all men of the faculty ſhould be members of the body.

body. All that was neceſſary was that it ſhould be compoſed of a ſufficient number of learned and diſcrete practiſers of phyſic, who ſhould have a power of continuing the ſucceſſion in ſuch perſons as themſeves, and that they ſhould licenſe proper perſons and reſtrain unfit perſons from the practice of it. If this were the object, is it natural to conſtrue the charter as giving a right to all men of the faculty to become members of this body, when the charter ſpeaks of men of the faculty in a ſenſe contradiſtinguiſhed from the members of the body; or to ſuppoſe that the Crown meant to incorporate all, when the charter was made for the governing of ſome, who, if all were incorporated, could not exiſt? It is admitted that there were two diſtinct claſſes under the charter, and according to Dr. *Stanger*'s conſtruction one claſs, that of the governed, would be extinguiſhed. Another mode of conſtruing the charter in the argument was by conſidering the words omnes homines ejuſdem facultatis to mean the individual members of the corporation: but if ſo, there would be no power given to make bye-laws to affect the licentiates; and the clauſe in the charter that gives the exemption from ſerving on juries ſpeaks of the perſons exerciſing the faculty as contradiſtinguiſhed from the members of the college; "nec preſidens nec aliquis de collegio prædicto medicorum, nec ſucceſſores ſui, nec eorum aliquis exercens facultatem illam." Therefore it ſeems to me that the homines facultatis are not the individual members of the college. Then it was ſaid that there might be ſome perſons who might not chooſe to become corporators, and that this would make a claſs to be governed: but that is improbable; it is not to be ſuppoſed that, as the principal object of the charter was to incorporate thoſe who were ſkilled in phyſic and to prevent thoſe from practiſing who were unfit, they to whom the charter was offered would refuſe the advantages of this corporation, eſpecially as the obvious means of conſtituting a body to conſiſt of all would be to make it compulſory on the phyſicians to become members, as is the caſe with companies in ſome city and corporate towns, of which perſons carrying on certain trades are obliged to be free. But ſeeing that there is in ſome degree an uncertainty as to the words "homines ejuſdem facultatis," the uſage that has prevailed ought to govern us in the conſtruction of them, eſpecially as the uſage perfectly accords with the deſign of the incorporation. It is ſaid indeed that the uſage is in favour of Dr. *Stanger*'s claim: but that is not ſo; for there is no proof that before theſe bye-laws were made any perſons were

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admitted into the body as a matter of right, and we muſt therefore take it that they came in by election. If Dr. *Stanger* claim as a matter of right, it muſt be under the words of the charter "quod ipſi omneſque homines ejuſdem facultatis &c:" but if this gave him the right, the college could not reſiſt his claim though he would not ſubmit to examination. And if every homo ejuſdem facultatis came within this deſcription of claim, Dr. *Archer* would have had a right to be admitted. The charter does not ſay that all the men of the faculty, who on examination ſhall be found fit, ſhall be admitted; if it has ſaid any thing in their favor, it has given them the right as ſoon as they become men of the faculty; it has directed no examination. Suppoſe by a charter all the weavers of a town were incorporated, they would all have a right to be admitted without any examination. If then all the men of the faculty within the limited diſtrict have a right from being men of the faculty, they poſſeſs all the fitneſs that the charter requires. This ſeems to me to be only a contrivance to get out of Dr. *Archer*'s caſe, and to ſet up a right on the ground of being a licentiate. In the courſe of the argument it was ſaid that only thoſe were to be admitted who were "profound ſad and diſcrete, groundedly learned and deeply ſtudied in phyſic:" but if ſo, it deſtroys the argument ariſing from the words "omnes homines ejuſdem facultatis." An argument has alſo been drawn from the ſtatute 3 *Hen.* 8.; and it has been ſaid that the perſons licenſed by that act were the only perſons who at the time of the charter were men of the faculty, and that they and the ſix perſons named were meant to be incorporated. But the words of the charter do not extend to all thoſe perſons; they are confined to the "homines de et in civitate prædictâ;" that is, to all men of and in the city of *London* practiſing phyſic: but this does not extend to perſons practiſing in other places. Now if that conſtruction had been adopted, it would have excluded the greater part of thoſe who have been members of the college practiſing phyſic in *Oxford*, *Cambridge*, and other places beyond theſe limits, as not falling within the deſcription of thoſe perſons of whom (according to the conſtruction) the college is to conſiſt.

Taking the whole of the charter and the uſage this conſtruction will reconcile all the difficulties; the intention of the Crown was to incorporate the ſix perſons named in the charter and all men practiſing phyſic at that time de et in civitate prædictâ; and all thoſe perſons were entitled to admiſſion: but the Crown did not intend

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intend to give any right to thoſe, who might thereafter become homines facultatis, but intended that the ſucceſſion ſhould be continued by the power incident to all corporations to elect. Had the charter incorporated nominatim every man authoriſed to practiſe phyſic in *London* and given no directions as to the ſucceſſion, they would have been authoriſed to continue themſelves by election as they have done; and the charter has done the ſame thing in ſubſtance by incorporating the ſame perſons by a general reference to their character and ſituation. This avoids all contradiction; it is conſiſtent with the uſage; and according to this conſtruction no one is entitled as a matter of right but only by election. In making ſuch elections there is a truſt and duty to keep up the body by a choice of learned men ſufficient to anſwer the purpoſes of the charter; and if this be done all the intereſt that the public have is conſulted; they have no intereſt in this or that man being a member of the college; ſo long as the body is continued and there are proper cenſors elects and other officers, and ſo long as proper perſons are licenſed and improper ones reſtrained, the objects of the charter as far as concerns the public will be attained. We have been preſſed however with the dicta of Lord *Mansfield* in *R.* v. Dr. *Aſkew*; very great deference is always due to whatever fell from him: but it is ſufficient to ſay that this was not the point then before the Court, the only queſtion there being whether licentiates were of the body.

On the other queſtion reſpecting the validity of the bye-laws, I can hardly add to what has already been ſaid by the Court; and therefore ſhall only ſay that I agree with them in thinking the bye-laws reaſonable.

Rule diſcharged (*a*).

(*a*) Dr. *Stanger* had before made an unſucceſsful application to this Court. He had obtained a rule calling on the preſident and fellows of the college to ſhew cauſe why a mandamus ſhould not iſſue, "commanding them to admit him to examination for admiſſion into the claſs or order of candidates for election into the ſociety or fellowſhip of the ſaid college." But as Dr. *Stanger* had preſented himſelf to the comitia minora to be examined, which court is conſtituted by one of the bye-laws with power only to examine candidates of a certain deſcription within which Dr. *Stanger* did not come, this Court in *Eaſter* term 1796 diſcharged the rule for the mandamus; ſaying that it did not appear that Dr. *Stanger* had any right to be examined by the comitia minora, but that if he had any title as being one of the homines facultatis under the charter he ſhould apply to the body at large. The Court alſo intimated at that time a ſtrong opinion that the bye-laws were reaſonable and valid.

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Wedneſday, May 24th.

An uncertificated bankrupt, bringing an action of trover for goods, required to give ſecurity for the coſts in caſe he ſhould fail in his ſuit.

Webb *againſt* Ward and another.

Best ſhewed cauſe againſt a rule for ſtaying the proceedings in an action of trover, until the plaintiff who was an uncertificated bankrupt ſhould give ſecurity for the coſts. He ſaid this was a novel attempt, for which there was no precedent. It was not like the caſe of requiring ſuch ſecurity from a foreigner who was not domiciled in this country, and who might therefore in caſe he failed in his ſuit immediately withdraw himſelf out of the reach of the proceſs of the court without any inconvenience. That if this attempt ſucceeded it might as well be required that every poor man who brought an action ſhould give the ſame ſecurity. That it did not follow that the property, if recovered, would belong to the plaintiff's aſſignees, as he might be a truſtee for others beneficially intereſted. He alſo cited *Laroche* v. *Wakeman*, *Peake* 140.

Garrow, *contrà*, ſaid that this caſe was peculiarly circumſtanced, and ought to furniſh an exception to the general rule. For in the caſe of an uncertificated bankrupt it is notorious that the property if recovered would not belong to himſelf but to his aſſignees; and here, though the creditors have ſigned the plaintiff's certificate, it has not yet been allowed, and conſequently is of no avail. This is an expedient of the aſſignees to try the queſtion without the riſk of paying coſts if they fail; and therefore it is but reaſonable, if they make uſe of the bankrupt's name for this purpoſe, that they ſhould be anſwerable for the coſts if he fails. The ſame reaſoning will apply to any other perſon for whoſe benefit the bankrupt may ſue. And this application is not unprecedented; for in a late caſe of *Saunders* v. *Purſe* a ſimilar rule was made abſolute after cauſe ſhewn, where the only ground aſſigned for it was the fact of the plaintiff's being an uncertificated bankrupt. He ſtated that the preſent defendants had been already indicted for obtaining theſe goods by robbery, in which the proſecution was abandoned by the proſecutor's counſel upon the opening of the caſe at the *Old Bailey*; ſince which time an indictment had been preferred againſt them for a conſpiracy in obtaining the goods, which was ſtill pending; and now they were again haraſſed by this action.

Lord **Kenyon**, Ch. J. It cannot be laid down as a general rule that an uncertificated bankrupt muſt in all caſes give ſecurity for coſts where an action is brought by him; that would be going much too far: each caſe muſt depend on it's own circumſtances. But it is fair to ſay that if the action be really brought for the benefit of the aſſignees they ſhould be reſponſible for the coſts. As to the certificate being ſigned but not allowed, it operates as nothing. I remember a caſe where a lottery ticket was given to the bankrupt by a creditor who had ſigned his certificate, as a mark of his approbation of his conduct; but it having been drawn a conſiderable prize before the actual allowance of the certificate, it was claimed and ſhared by the creditors at large. But what weighs with me to grant the preſent application is that this action muſt be brought for the benefit of the aſſignees; for an uncertificated bankrupt cannot have any property of his own. This is not an action for the fruits of his perſonal labour ſince his bankruptcy, but for goods which if they belong to him at all muſt by law be veſted in his aſſignees.

Rule abſolute.

Hardwick and another *againſt* Bluck.

Monday, May 29th.

Bail who are excepted to, and do not juſtify on the day appointed, cannot afterwards ſurrender the principal, being thereby out of court: but the defendant being in point of fact in cuſtody before the aſſignment of the bail-bond, the Court ſet aſide proceedings thereon upon payment of coſts.

THE writ was returnable on the 3d of *May*, being the firſt return day of the term: bail was put in in due time, and notice of exception was given on the 15th; and on the ſame day notice of juſtification for the 19th: the bail did not appear on that day to juſtify, and no further time was obtained; but on the next day they ſurrendered the principal, and gave notice of it accordingly; and afterwards on the ſame day the plaintiffs took an aſſignment of the bail-bond, on which proceſs was ſued out on the 22d.

Erſkine obtained a rule calling on the plaintiffs to ſhew cauſe why the proceedings on the bail-bond ſhould not be ſet aſide for irregularity, the defendant having been ſurrendered before the aſſignment of the bail-bond.

Vaughan ſhewed cauſe; ſtating the practice to be that if the bail do not juſtify on the day appointed, and no further time be allowed for them to do ſo, they are out of court, and cannot afterwards ſurrender the principal: and

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The Court upon reference to the Maſter ſaid that the practice was ſo: but under the circumſtances of this caſe, the plaintiffs having got the defendant's body before the aſſignment of the bail-bond, they made the rule abſolute upon payment of coſts.

Monday, May 29th.

Hutchinson *againſt* Brown.

A declaration is only well filed from the time of notice, whether it be a declaration in chief or de bene eſſe; and therefore the defendant has four days after notice in which to plead in abatement.

THE declaration de bene eſſe in this caſe was filed on the 30th of *January* laſt, to which the defendant pleaded in abatement within four days from the ſervice of notice of declaration, but not within four days from the filing of the declaration; and the plaintiff afterwards ſigned judgment for want of a plea.

Lambe now moved to ſet aſide the judgment; inſiſting on the rule of court *Tr.* 2 *Geo.* 2. that "the declaration was only well delivered from the time of the notice;" and conſequently that the plea was put in in proper time.

Gibbs, who oppoſed this in the firſt inſtance, relied on the caſe of *Grey* v. *Saunders* (*a*), as eſtabliſhing a diſtinction between declarations in chief and de bene eſſe; it being there ſaid "the declaration *not being de bene eſſe* was only well delivered from the time of notice." But

The Court, after conferring with the Maſter, ſaid that according to the practice of this court a declaration is only conſidered as being well delivered from the time of notice, in which reſpect there is no diſtinction between a declaration in chief and a declaration de bene eſſe.

Rule abſolute.

(*a*) *Barnes* 248.

THE END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

CARR *againſt* SHAW and JAMES MORGAN PRICE.

Saturday, June 17th.

Leave granted to amend a ſpecial capias, in order that an application might be made to the Maſter of the Rolls to procure a new original.

THE proceedings in this caſe, which was an action on a promiſory note, were by original. The plaintiff arreſted *Shaw*, who put in bail, and proceeded to outlawry againſt the other defendant by the name of *JAMES Morgan Price*, his real name being *JOHN*. On diſcovering this miſtake, he now moved by

Gibbs and *Bayley* to amend the ſpecial capias, in order that he might procure a new original. They ſtated that their object in making this motion was to hold the bail of *Shaw* ſtill liable, who could have no reaſon to complain of the amendment, becauſe the proceedings againſt *Shaw*, for whom they were bail, were regular.

Law and *Eſpinaſſe* oppoſed this in the firſt inſtance on two grounds; 1ſt, Becauſe it was in effect to amend an original, which could not be amended, *Blackamore*'s caſe, 8 *Co.* 156; 2dly, Becauſe it would be unjuſt as againſt the bail, who had a right to take advantage of any defect in the plaintiff's proceedings. And they obſerved that as far as reſpected the defendants themſelves the plaintiff was now at liberty to begin de novo.

CARR *againſt* SHAW.

But *The Court* ſaid it was reaſonable that the plaintiff ſhould amend on payment of all the coſts, though they thought that the proceedings in the outlawry ſhould be firſt ſet aſide.

Lord KENYON, Ch. J. ſaid there was no doubt but that even an original might be amended on an application to the Maſter of the Rolls, though it could not be amended in this court; that when he was Maſter of the Rolls he had known ſeveral inſtances of the kind; and that before he was Maſter of the Rolls an original had been ſupplied even in the caſe of a penal action brought by Sir *R. Bampfylde* on the game laws.

Gibbs then moved to ſet aſide the proceedings in outlawry, which was granted; and then the firſt rule was granted on the plaintiff's paying all the coſts in the former action as well as thoſe attending this application.

Rule abſolute.

Tueſday, June 20th.

SMITH *againſt* BROOMHEAD.

Where a commiſſion of bankrupt is taken out fraudulently or maliciouſly, the Chancellor may under ſtat. 5 *G.* 2. *c.* 30. order a ſpecific ſum by way of damages to be paid by the petitioning creditor to the bankrupt, or aſſign the bond given by the former and enable the latter to recover the whole penalty of the bond. The aſſignment of the bond by the Chancellor is concluſive evidence of the fraud or malice in an action brought on ſuch bond. It is not neceſſary to ſtate in a declaration on ſuch bond that the commiſſion was fraudulently or maliciouſly ſued out.

DEBT on bond in 200*l.* The declaration ſtated that the defendant on the 4th of *January* 1797 in order and to the intent that a commiſſion of bankrupt might be awarded and iſſued againſt the plaintiff on the petition of the defendant and two other perſons the executors of *J. Broomhead* deceaſed gave to the Lord Chancellor according to the form of the ſtatute a bond in 200*l.*, with a condition that if the defendant and the ſaid two other perſons executors &c ſhould prove as well before the major part of the commiſſioners to be appointed in a commiſſion of bankrupt againſt the plaintiff as upon a trial at law in caſe the due iſſuing forth of the commiſſion ſhould be conteſted that the plaintiff was juſtly and truly indebted to the defendant and to the ſaid two other perſons in 100*l.*, and was become bankrupt &c, and ſhould cauſe the ſaid commiſſion to be executed according to the directions of the ſtatute 5 *Geo.* 2. *c.* 30, then the ſaid obligation to be void. That afterwards, to wit, on the 12th of *January* 1797 a commiſſion of bankrupt was awarded againſt the plaintiff &c, but that the defendant and the ſaid two other perſons did not nor did any or either of them prove before the major part of the commiſſioners that the plaintiff was indebted to them in 100*l.*

and was become bankrupt &c, according to the form and effect of the ſaid condition, but therein wholly failed; by means whereof the ſaid bond became forfeited to the ſaid Lord Chancellor, who upon the petition of the plaintiff (being the perſon in that behalf grieved) by an indorſement on the ſaid bond under his hand and ſeal aſſigned the ſaid bond to the plaintiff according to the form of the ſtatute &c, the ſaid bond being ſo forfeited and the ſaid money therein mentioned being wholly unpaid; by reaſon whereof and by force of the ſtatute &c an action hath accrued to the plaintiff, as aſſignee of the Lord Chancellor, to demand and have of and from the defendant the ſaid ſum of 200*l.* &c.

The defendant pleaded that the ſaid commiſſion of bankrupt was not taken out fraudulently or maliciouſly; to which the plaintiff demurred generally.

Onſlow, in ſupport of the demurrer, objected to the plea, becauſe it tended to put in iſſue a matter on which the Lord Chancellor's judgment was deciſive: the Court then deſired to hear the other ſide.

Beſt, *contrà*. It may be admitted that the plea cannot be ſupported: but the declaration itſelf is defective in ſeveral particulars. As the action is brought by an aſſignee, it ſhould appear on the declaration that the caſe is within the ſtatute (*a*), otherwiſe the plaintiff cannot recover. 1ſt, The judgment of the Lord Chancellor on the fraud and malice, which conſtitute the grounds of action, is not concluſive on the defendant but it is examinable in this action. The Legiſlature by enabling the aſſignee of ſuch a bond to ſue on the bond evidently intended that the whole queſtion ſhould be open to the parties; otherwiſe the Court in which the action is brought would be placed in the ſituation of executing a judgment pronounced by another tribunal, the legality or propriety of which they have no means of examining. The

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(*a*) The ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 23. "for preventing the taking out of commiſſions of bankrupt maliciouſly" enacts that the petitioning creditor ſhall before ſuing out the commiſſion make an affidavit of the debt, "and give a bond to the Lord Chancellor in the penalty of 200*l.* to be conditioned for proving his debt as well before the commiſſioners named in the commiſſion as upon a trial at law in caſe the due iſſuing forth of the ſame ſhall be conteſted and tried, and alſo for proving the party a bankrupt at the time of taking out ſuch commiſſion &c.; and if ſuch debt ſhall not be really due or owing, or if after ſuch commiſſion taken out it cannot be proved that the party was a bankrupt at the time of iſſuing the commiſſion, but on the contrary it ſhall appear that ſuch commiſſion was taken out fraudulently or maliciouſly, then the Lord Chancellor &c ſhall and may upon the petition of the party grieved examine into the ſame, and order ſatisfaction to be made to him for the damages by him ſuſtained; and for the better recovery thereof may in caſe there be occaſion aſſign ſuch bond to the party ſo petitioning, who may ſue for the ſame in his name."

reaſons given by the judges in the Ducheſs of *Kingſton*'s caſe (*a*) apply with equal force to this caſe. The judgment of the Lord Chancellor reſpecting the queſtion of bankruptcy is not deciſive but may be queſtioned in an action or indictment; nay it is not even evidence of the bankruptcy, but the aſſignees are obliged to eſtabliſh by proof all the facts that ſupport the bankruptcy. The ſame rule alſo holds in thoſe caſes in which the bankrupt himſelf is a party; as in indictments againſt the bankrupt for abſconding from the commiſſion, or for embezzling his property. Then there is no reaſon why the Lord Chancellor's judgment ſhould be concluſive in this caſe; and queſtions of fraud and malice, on which alone this action can be maintained, are peculiarly fit for the conſideration of a jury. But 2dly, Even if the Lord Chancellor's judgment be concluſive on this head, ſtill it ſhould have been averred in the declaration that the commiſſion was fraudulently or maliciouſly ſued out, as the foundation of the Chancellor's deciſion. Nothing can be collected by intendment: but every fact that is neceſſary to bring the plaintiff's caſe within the ſtatute ſhould be ſtated in the declaration as part of the plaintiff's title. The Ducheſs of *Kingſton*'s caſe, 11 *State Trials*, 261; *Spieres* v. *Parker*, *ante*, 1 vol. 141; and *Beake* v. *Tyrrel*, 1 *Show.* 6. In the laſt of thoſe caſes, which was treſpaſs for taking the plaintiff's ſhip, the defendant juſtified that he took the ſhip as prize which was condemned in the Admiralty Court as prize; and yet judgment was given for the plaintiff, for *Holt*, Ch. J. ſaid "It doth not appear how this ſhip came to be prize; nor that there was any cauſe to ſeize her as ſuch; the ſubſequent going to the Admiralty cannot juſtify the firſt illegal caption." So here it ſhould have been averred that the defendant fraudulently or maliciouſly ſued out the commiſſion, and that the Lord Chancellor after examining into the caſe on the plaintiff's petition adjudged that it was ſo fraudulently or maliciouſly ſued out: whereas there is no averment of fraud or malice; nay, it is not even alleged that the Lord Chancellor either determined or examined into this queſtion; it being ſimply ſtated that he aſſigned the bond to the plaintiff. 3dly, It was not the intention of the Legiſlature that the aſſignee ſhould recover the penalty of the bond, but only a ſatisfaction for the damages ſuſtained by him, which the Lord Chancellor is to order, and the bond is directed to be aſſigned "for the better recovery thereof," that is, of ſuch ſatisfaction. Therefore it ſhould

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(*a*) 11 *St. Tr.* 261, 2.

ſhould have been ſtated that the Lord Chancellor had examined into the ſubject, and ordered a ſpecific ſatisfaction to be made, and that ſuch ſatisfaction ſtill remained unpaid. This is in ſome reſpects like a bond of indemnity, on which no action can be brought until the party has been damnified; and that fact muſt be ſtated.

Onſlow for the plaintiff. By the ſtatute the Lord Chancellor is authoriſed to examine into the whole matter, and to decide on the queſtion of fraud or malice. He is inveſted with a diſcretion either to aſſign the bond or not as he thinks proper after an examination: but his judgment on the point is as concluſive as any other judgment of a court of law which is the foundation of an action. This alſo gives an anſwer to the ſecond objection; for if the Lord Chancellor's judgment be deciſive on the fraud and malice, it was not neceſſary to aver that the commiſſion was fraudulently or maliciouſly ſued out, ſince that averment is included in the allegation that the Lord Chancellor aſſigned the bond to the plaintiff, which he could not have done unleſs he had decided that the commiſſion was fraudulently or maliciouſly ſued out. In anſwer to the third objection, the penalty of the bond is the debt. In *Brown* v. *Chapman* (*a*) Lord *Manſfield* intimated an opinion that a plaintiff, who ſued on this ſtatute, would be entitled to the penalty of the bond. Perhaps the Lord Chancellor might have ordered a ſmaller ſum than the penalty to be paid by way of ſatisfaction, and then it would have been neceſſary for the plaintiff to have ſet forth what that ſatisfaction was, and that it remained unpaid: but it was competent to the Lord Chancellor to order the whole ſum of 200*l.* to be paid; and by aſſigning the bond to the plaintiff, without making any other order, it was in effect determining that the penalty of the bond was the ſatisfaction that the plaintiff was entitled to receive.

Lord KENYON, Ch. J. I think that this action on the bond is maintainable. It is clear that the Legiſlature did not intend that the Court, in which the action is brought, ſhould examine into the queſtion of fraud or malice. The act of parliament, in order to prevent commiſſions of bankrupt being taken out improperly, requires the petitioning creditor to give a bond in the penalty of 200*l.*; adding that, if the ſuppoſed debt be not due, or if the party be not proved a bankrupt, and it ſhall appear that the commiſſion

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(*a*) 3 *Burr.* 1418, and 1 *Bl. Rep.* 427.

miſſion was taken out fraudulently or maliciouſly, then the Lord Chancellor may on the petition of the party grieved *examine into the ſame*, that is, "into all the premiſes before ſtated," the fraud or malice of ſuing out the commiſſion as well as the exiſtence of the petitioning creditor's debt or the bankruptcy; and may order ſatisfaction to be made for the damages ſuſtained, and aſſign the bond; but for what? in order that his judgment may be again reviſed? That would be abſurd: the deciſion of the Lord Chancellor is deciſive on the ſubject. Then it was urged that at all events the Lord Chancellor ſhould have aſcertained the quantum of damages, and that the action on the bond ſhould only be brought to enforce payment of ſuch damages. That objection has more the appearance of foundation than the others: but there is a great authority againſt it, that of Lord *Hardwicke* in the caſe *Ex parte Gayter* (*a*), where the Chancellor having aſſigned the bond to the party grieved, the petitioning creditor applied to diſcharge that order, or at leaſt to ſuſpend any action on the bond until the damages were inquired into; but Lord *Hardwicke* ſaid "It was in the breaſt of the Court, where the bankruptcy was a doubtful caſe and the commiſſion ſuperſeded, either to direct an inquiry before a Maſter of the damages ſuſtained by the bankrupt, or a quantum damnificatus upon an iſſue at law, and after the damages are ſettled the Court might for the better recovery thereof order ſuch bond to be aſſigned: but that caſe was attended with ſuch flagrant circumſtances that he would not by a previous inquiry into the damages ſuſtained by the bankrupt prevent his ſeeking an immediate ſatisfaction;" and therefore he diſmiſſed the petition. Now that is a weighty authority; and according to that, the Lord Chancellor may either aſſeſs the damages or enable the plaintiff to recover the whole penalty of the bond.

ASHHURST, J. and GROSE, J. of the ſame opinion.

LAWRENCE, J. The Lord Chancellor was to exerciſe his judgment whether the bond ſhould or ſhould not be aſſigned: he has aſſigned it, and his judgment is concluſive in this action. Then it is ſaid that if this be concluſive there is nothing to be tried in ſuch an action: but the defendant may plead performance, non eſt factum, or that the bond was not aſſigned. This is not like a bond of indemnity, to which it has been compared: in ſuch a caſe before the ſtatute of *William* the parties were driven

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(*a*) 1 *Atk.* 144.

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into a court of equity to enquire into the damages ſuſtained: but this bond does not come within that act of parliament.

Judgment for the plaintiff.

MARKS *againſt* UPTON.

Tueſday, June 20th.

The inſolvent act 34 *G.* 3. *c.* 69. does not diſcharge the perſon of an inſolvent (who is entitled to the benefit of that act) from the payment of the arrears of an annuity becoming due after his diſcharge on a covenant made before the act.

THIS was an action of covenant contained in an indenture dated the 10th of *February* 1787, in which the defendant covenanted, for the conſideration therein mentioned, to pay the plaintiff an annuity of 20*l.* during the defendant's life by half-yearly payments; and the breach aſſigned was the non-payment of 50*l.* for two years and an half due the 24th of *June* 1796.

The defendant pleaded, in diſcharge of his perſon, that he was actually a priſoner in the Compter in *London* at the ſuit of the plaintiff on the 12th of *February* 1794, and was duly diſcharged according to the ſtat. 34 *Geo.* 3. *c.* 69. (the inſolvent debtors' act) at the Quarter Seſſions holden for the city on the 10th of *September* in the 34th year of the reign &c; and that the ſum of money, for the non-payment of which the action is brought, was contracted before the 12th of *February* 1794.

To this plea the plaintiff demurred, and aſſigned for cauſe that it appeared by the declaration that the plaintiff declared for the non-payment of two years' arrears of the annuity due on the 24th of *June* 1796, and that the ſaid arrears were not due or accruing as appeared by the declaration on the 12th of *February* 1794.

Wigley, in ſupport of the demurrer, relied on the caſe of *Cotterel* v. *Hooke*, *Dougl.* 97. as a direct authority in point; obſerving that there was no difference between the ſtatute 16 *Geo.* 3. *c.* 38. *ſ.* 33. on which the plea was framed in that caſe, and the ſtat. 34 *Geo.* 3. *c.* 69. *ſ.* 31. on which this defence reſted, except that in the latter power is given to two juſtices, as well as to the juſtices at the Quarter Seſſions, to diſcharge the priſoner.

Erſkine, for the defendant, acknowleging that this caſe could not be diſtinguiſhed from that cited,

The Court gave judgment for the plaintiff; ſaying that they had looked into the authorities on this ſubject, and that they were in his favor.

Judgment for the plaintiff (*a*).

(*a*) Vid. *Auriol* v. *Mills*, in Error; *ante*, 4 vol. 94.

1797.

Tueſday, June 20th.

WESTERDELL *againſt* DALE.

A. and *B.* being joint owners of a ſhip, *A.* conveyed his moiety to *B.*: but in the bill of ſale the certificate of regiſtry was not truly recited: *B.* took poſſeſſion, and afterwards mortgaged the whole ſhip to *A.* who did not take poſſeſſion; then *B.* ordered *C.* to repair the ſhip: afterwards *B.* conveyed one-half of the ſhip to *A.* and the other to *D.*:—held that the firſt bill of ſale was an abſolute nullity under the ſtat. 26 *G.* 3. *c.* 60. *ſ.* 17; and that *A.* was liable to *C.* for the repairs of the ſhip in an action for work and labour brought by *C.*, *A.* not having pleaded in abatement that *B.* ought alſo to have been ſued.

Whether a mortgagee of a ſhip, out of poſſeſſion, be not liable for the repairs? Qu.

THIS was an action for work and labour in repairing the defendant's ſhip; to which the general iſſue was pleaded; and on the trial a ſpecial verdict was found. It ſtated that on the 1ſt of *October* 1790 the defendant and one *J. Wharton* were the ſole owners of the ſhip called *St. Vincent*, being a ſhip then belonging to the port of *London;* and being ſuch owners they on the ſaid 1ſt of *October* cauſed the ſame to be duly regiſtered in the port of *London;* and a certificate of ſuch regiſtry was on the ſame day and year duly granted, as follows, that is to ſay; "In purſuance of an act paſſed in the 26th year of the reign of King *George* the Third, "intitled an act for the further increaſe and encouragement of ſhipping and navigation" *Robert Dale* of *Old Gravel Lane St. George's in the Eaſt,* Merchant [having taken and ſubſcribed the *affirmation*[1]] required by the ſaid act, and [having affirmed[2]] that himſelf together with *Joſeph Wharton* of *Scarborough* [in the county of *York* Merchant, who is not reſident within twenty miles of *London* and has not abſented himſelf to avoid taking the ſaid affirmation or oath[3],] are ſole owners of the ſhip or veſſel called *St. Vincent* of *London* [whereof *William Prior* is at preſent maſter[4]] and that the ſaid ſhip or veſſel was taken prize, legally condemned, and made free, as appears by a regiſter N° 269. granted at *London* the 31ſt of *October* 1786 now delivered up and cancelled. And *Samuel Brown* ſurveyor for ſloops and boats and *John Jarratt* ſurveyor for the act of Navigation having certified to us that the ſaid ſhip or veſſel is *Dutch* built, has two decks, and three maſts, that her length from the forepart of the main-ſtern to the afterpart of the ſtern-poſt aloft is [104[5]] feet, her breadth at the [broadeſt part of the main-wales[6]] 27 feet 6 inches, her height between the decks 4 feet 9 inches, and admeaſures 343 tons, that ſhe is a round lute-ſterned ſhip with quarter-badges and her quarter-deck runs near the main-maſt, has no gallery and a woman's head; and the [ſubſcribing owner[7]] having conſented and agreed to the above deſcription and admeaſurement and having cauſed ſufficient ſecurity to be given as is required by the ſaid act the ſaid Ship *St. Vincent* has been duly regiſtered at the port of *London;* given under our hands and ſeals of office at the Cuſtom-houſe in the

WESTERDELL *againſt* DALE.

the ſaid port of *London* this 1ſt day of *October* 1790. [*W. Bates*, deputy collector, *W. Hord*, pro-con. Entered in the office of the Regiſter-general of Shipping, 1ſt *October* 1790. *T. Lewis*[8]."]

The verdict then ſet forth that on the 1ſt of *February* 1792 the defendant by a bill of ſale in conſideration of 750*l.* granted bargained and aſſigned his moiety in the ſaid ſhip to *J. Wharton*: in that bill of ſale the certificate of regiſtry was recited, but the following variations were made in it; inſtead of the words between the brackets, page 306, N° 1. were inſerted "having taken and ſubſcribed the *oath*;" N° 2. "having *ſworn*;" N° 3. all thoſe words omitted; N° 4. "whereof *J. Lotherington* is at preſent maſter;" N° 5. all theſe dimenſions in *figures* (*a*); N° 6. "broadeſt part *above* the main wales." N° 7. "ſubſcribing owner*s*;" N° 8. all thoſe words omitted.

The verdict then ſet forth that *J. Wharton* by indenture dated on the 2d of *November* 1792, after reciting that he was indebted to the defendant in 1600*l.*, in conſideration thereof and of 10*s.*, granted bargained and aſſigned the ſaid ſhip to the defendant his excutors &c; with a proviſo for making void the ſame on payment of 1600*l.* with intereſt in purſuance of the covenant thereinafter contained; and *J. Wharton* covenanted with the defendant to pay him the 1600*l.* with intereſt at the rate of 5*l.* *per cent.* on the day next after the date of that indenture; and alſo that if default ſhould be made in payment of the 1600*l.* and intereſt the ſaid ſhip ſhould remain and continue unto the defendant his executors &c, and that he and they ſhould hold and enjoy the ſame to his and their proper uſe as his and their goods and chattels free and clear from the proviſo thereinbefore contained. In that indenture the certificate of regiſtry was alſo recited, but it was inaccurately recited, and it differed from the original in almoſt all the particulars pointed out in the recital in the firſt bill of ſale. The verdict then ſet forth that no indorſement was made on the certificate of regiſtry of any alteration of property by transfer from the defendant to *Wharton* or from *Wharton* to the defendant. That when the ſaid indenture was made the ſhip was on a voyage to *Archangel* in *Ruſſia*, but returned to *Kingſton upon Hull* in *December* 1792. That on the 30th of *January* 1793 *J. Wharton*, who then acted as ſole owner of the ſhip of which *J. Lotherington* was then

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(*a*) Though this was pointed out as a variation from the original certificate, in truth it was no variation, the original being in figures.

maſter, employed the plaintiff to repair the ſame, and the ſame was accordingly repaired by the plaintiff, who in his account made a debit thereof as follows, "Ship *St. Vincent*, Captain *J. Lotherington*, *J. Wharton*, D^r to *T. Weſterdell*" for the repairs. That after the ſhip had been ſo repaired *J. Wharton* on the 26th of *April* 1793 for a valuable conſideration abſolutely ſold conveyed and aſſigned one moiety of the ſhip to the defendant and the other moiety to one *J. Todd* and *G. Fletcher*, which aſſignment was duly regiſtered. And that the defendant never took actual poſſeſſion of the ſhip in conſequence of the indenture dated the 2d of *November* 1792, nor at any time after the making of the ſame until the execution of the abſolute conveyance of the moiety of the ſaid ſhip made to him in *April* 1793.

This caſe was twice argued; the firſt time in *Eaſter* term laſt by *Wood* for the plaintiff and *Chambre* for the defendant, and now by *Law* for the former and *Maryatt* for the latter.

Arguments for the plaintiff.—It will be urged on behalf of the defendant, who was only a mortgagee when the ſhip was repaired, that he is not liable for any repairs done to the ſhip before he was actually in poſſeſſion: but it is contended by the plaintiff that the defendant was at that time the legal owner of a moiety of the ſhip, and that this action is maintainable againſt him, he not having pleaded in abatement that any other perſon ought to have been ſued with him. In order to ſee who was the legal owner of the ſhip, it is neceſſary to look to the conveyance from the defendant to *Wharton* in *February* 1792; for unleſs the certificate of regiſtry be therein ſet forth purſuant to the directions of the ſtat. 26 *Geo.* 3. *c.* 60. (*a*) the conveyance is abſolutely void, and the legal property ſtill remains in the defendant. Now by adverting to that bill of ſale it is evident that the certificate of regiſtry is not truly and accurately ſet forth therein. [Here the variations noticed in page 306 were pointed out.] And though in *Rolleſton* v. *Smith* (*b*) it was holden that a mere clerical miſtake in reciting the certificate of regiſtry did not vitiate the bill of ſale, that miſtake appearing on the face of the inſtrument itſelf, it was decided in *Rolleſton* v. *Hibbert* (*c*) that the omiſſion of the certificate rendered

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(*a*) It is enacted by the 17th clauſe of that act "that when and ſo often as the property in any ſhip belonging to any of his majeſty's ſubjects ſhall be transferred to any other of his majeſty's ſubjects in whole or in part, the certificate of the regiſtry of ſuch ſhip ſhall be truly and accurately recited in words at length in the bill or other inſtrument of ſale thereof, and that otherwiſe ſuch bill of ſale ſhall be utterly null and void to all intents and purpoſes."

(*b*) *Ante*, 4 vol. 161.

(*c*) *Ante*, 3 vol. 406.

the bill of ſale a nullity. Now this is not a true and accurate recital of the certificate of regiſtry: the variations between the original and the recital are ſo numerous that a perſon referring to both would be induced to ſuppoſe that they contained a deſcription of different ſhips. Then the conſequence of this not being a true and accurate recital is that this bill of ſale is an abſolute nullity, and the legal title to the moiety ſtill remains in the defendant. But if this bill of ſale were ſufficient to paſs the ſhip from the defendant to *Wharton*, then it was contended that the ſubſequent conveyance from *Wharton* to the defendant dated 2d of *November* 1792, which was alſo liable to the ſame objections as the firſt bill of ſale reſpecting the miſrecital of the certificate of regiſtry, was a conditional ſale to the defendant and not a mortgage; or that if it were a mortgage, the defendant was liable to the repairs of the ſhip on the ground that a mortgagee, though not in poſſeſſion, was entitled to the profits of the ſhip; *Moſs* v. *Gallimore*, *Dougl.* 278.; *Rich* v. *Coe*, *Cowp.* 636.

The Court intimated a ſtrong opinion on the firſt argument that the conveyance of the 2d of *November* 1792 was a mortgage, and on the ſecond argument that point was conceded by the plaintiff's counſel. The laſt point, reſpecting the liability of a mortgagee out of poſſeſſion, was ſtrongly conteſted: but as the Court declined giving any opinion upon it, the arguments of the counſel on both ſides on that head are here omitted.

Arguments for the defendant. Firſt, the conveyance from the defendant to *Wharton* was a valid conveyance, notwithſtanding the defects in the recital of the certificate of regiſtry, and conſequently the property paſſed to the latter. The object of the Legiſlature in paſſing this ſtatute was to deprive foreign ſhips of the benefits to which *Engliſh* ſhips are entitled, to effect which it requires ſuch a deſcription of the ſhip in every transfer of it that it may be known by a reference to the Cuſtom-houſe whether the ſhip in queſtion be or be not entitled to the benefits conferred by the ſtatute. Now the deſcription of this ſhip in the conveyance from the defendant to *Wharton* is ſufficiently accurate to anſwer that purpoſe: the recital of the certificate of regiſtry agrees with the certificate itſelf in all the material points; the fact of condemnation, the date of the regiſtry, the name and the dimenſions of the ſhip; and the variations are mere clerical errors of no importance; and according to the authority of *Rolleſton* v. *Smith* ſuch errors will not vitiate the bill of ſale. But even if this were not a valid inſtrument as between the defendant and *Wharton* on account of theſe defects, ſtill it is not competent to other perſons

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to take advantage of the objection. Here the queſtion is not reſpecting the validity of the transfer between the defendant and *Wharton*, but it ariſes on a collateral contract. It does not follow, becauſe the vendee could not have retained poſſeſſion of the ſhip againſt the vendor or his aſſignees if he had become a bankrupt, that the defendant is liable in this action for repairs done to the ſhip at the inſtance of *Wharton*. The parties themſelves have conſidered this to be a valid transfer, and have acted upon it as ſuch ever ſince; *Wharton* took poſſeſſion under it, acted as owner in giving orders for the repairs, then mortgaged this very ſhip to the defendant on the idea that the property of the ſhip was in him, and afterwards actually ſold it for a valuable conſideration to the defendant and two other perſons. This is an attempt by a third perſon to compel a party to aſſume an ownerſhip which he diſclaims, to the detriment of another. In the inſtance of indentures of apprenticeſhip, the ſtatute 5 *Eliz. c.* 4. requires the apprentice to be bound for ſeven years, ſaying that all other indentures "are void to all intents and purpoſes;" and yet it has been holden in queſtions of ſettlement law (*a*) and in actions for enticing away an apprentice (*b*) that an indenture for a ſhorter period is not abſolutely void, but only voidable, and that at the election of the parties themſelves, for that third perſons cannot ſet up the objection. Here *Wharton* was in poſſeſſion as owner; and though he was in under a defective conveyance, it is not competent to the plaintiff to charge the defendant, who was not in poſſeſſion and who claimed no title, for the repairs done to the ſhip as on a contract. Suppoſing a diſſeiſor or a perſon under an invalid conveyance were in poſſeſſion of land, and ordered buildings to be erected, the workman could not reſort to the right owner and recover againſt him as on a contract made with him, even when the right owner recovered the poſſeſſion; much leſs could he compel the owner to aſſert his title: but he muſt reſort to the perſon in poſſeſſion who employed him. In this caſe no credit was even given to the defendant perſonally; it was given to the ſhip. Secondly, It was not a conditional ſale, but a mortgage from *Wharton* to the defendant. *Floyer* v. *Lavington*, 1 *P. Wms.* 271; *Miller* v. *Lee*, 2 *Atk.* 494; 4 *Bro. P. Caſ.* 142; and the latter, as mortgagee, cannot be charged with the repairs, not being in poſſeſſion; *Eaton* v. *Jaques*, *Dougl.* 454; *Jackſon* v. *Vernon*, 1 *H. Bl. Rep.* 114; and *Chinnery* v. *Blackburne*, *ib.* 117, note *a*.

(*a*) *R.* v. *St. Nicholas, Ipſwich, Burr. S.C.* 91.

(*b*) *Parker* v. *Smith*, C. B. 1785, on a motion for a new trial.

Reply to the firſt ground. The words of the ſtatute, which require "a true and accurate recital in words at length" of the certificate of regiſtry, give an anſwer to the argument that a general deſcription of the ſhip in the bill of ſale is ſufficient. The ſtatute alſo ſays that a bill of ſale, in which the certificate is not truly recited, ſhall be "utterly null and void to all intents and purpoſes:" then it cannot be a valid inſtrument to any purpoſe; and it is immaterial by whom the objection is taken, the Court are bound to give their opinion on the validity of this inſtrument. If it be a nullity as between the defendant and *Wharton*, it muſt equally be a nullity as to all perſons. This queſtion cannot depend on the wiſhes or conſent of the parties to the inſtrument; a determination that it does would have the effect of repealing the ſtatute. With regard to the caſes of apprenticeſhip; they profeſſed to go on the ground that ſuch an indenture was only voidable; and therefore they are not applicable to this caſe where the inſtrument is declared abſolutely null and void.

Lord KENYON, Ch. J. Although this comes before us on a ſpecial verdict, and the caſe has been twice argued, it does not appear to me to be a caſe of much difficulty: the plaintiff's argument on the firſt part of the caſe is, in my opinion, concluſive. It ſeemed to be admitted through the whole argument that the owner of the ſhip is liable to pay the expences of repairing her. Therefore the only enquiry here is, Who is the owner of this ſhip? And that depends on the ſtat. 26 *Geo.* 3. *c.* 60. *ſ.* 17. by which it is enacted that when the property in any ſhip is tranſferred the certificate of regiſtry of ſuch ſhip ſhall be truly and accurately recited in words at length in the bill of ſale, otherwiſe ſuch bill of ſale ſhall be *utterly null and void to all intents and purpoſes*. Caſes have ariſen on the conſtruction of this act of parliament that diſtreſſed our feelings: in one inſtance we relaxed a little from the ſtrict words of the act in deciding that a mere clerical error did not vitiate the bill of ſale, the certificate being in effect the ſame, and the error being apparent in the inſtrument itſelf; and in making that relaxation I hope we did not tranſgreſs the limits of our duty. But in this caſe the recital of the certificate of regiſtry in the bill of ſale from the defendant to *Wharton* is ſo totally unlike the certificate itſelf from the beginning to the end of it, that there is ſcarcely any ſimilitude between them. Without repeating all the different variations that have been pointed out, it is ſufficient to ſay that the certificate

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tificate of regiſtry is not truly and accurately recited in the bill of ſale; and then it follows that this is not a legal transfer of the ſhip. If any inconveniences have reſulted to the public from this regulation in the act, and if it be expedient to relax from the words of the act in this reſpect, application muſt be made to the Legiſlature for that purpoſe and not to a court of law. On this ſhort ground therefore it ſeems to me that we are bound to ſay that the defendant remains owner of part of the ſhip, notwithſtanding his attempt to transfer his intereſt in it to *Wharton* by the bill of ſale in *February* 1792: he was undoubtedly owner before that time, and no competent act has been ſince done to diveſt him of the ownerſhip. With reſpect to the caſes of indentures of apprenticeſhip which have been cited, Lord *Hardwicke* thought that the indentures were only voidable.

Other points have been diſcuſſed in this caſe, but it is not neceſſary to go into them at large, or to give any deciſive opinion upon them now. But as ſome caſes have been referred to on theſe points, I think it proper to obſerve that whenever it becomes neceſſary to decide thoſe queſtions thoſe caſes may perhaps deſerve further conſideration. In *Rich* v. *Coe* (*a*) it was ſaid that the perſon ſupplying a ſhip with neceſſaries has a treble ſecurity; the perſon of the maſter, the ſhip, and the perſonal ſecurity of the owners; but I doubt whether that doctrine is not too generally laid down; Sir *J. Jekyll* held in a caſe before him that the maſter could not ſubject the ſhip if in *England*, and that was afterwards confirmed by Lord *Hardwicke*. As to the caſes reſpecting the mortgagee; whether in or out of poſſeſſion he is the legal owner, and muſt ſo be conſidered in a court of law, notwithſtanding his title is ſubject to equitable intereſts. It is ſaid in one of the caſes that a mortgagee is only liable when in poſſeſſion, and that what proves this point is that in charging the mortgagee it is neceſſary to ſtate in pleading that he entered and was poſſeſſed: but with great deference to the learned judge who gave that reaſon, I doubt it; I conſider thoſe as mere formal words. It has alſo been argued that there is a difference between a mortgage of real and perſonal property: but that diſtinction affords a ſtrong argument againſt the mortgagee of a ſhip; for the inſtant a transfer of the ſhip is made, though by way of mortgage, the mortgagee may ſtate that he was poſſeſſed: in all actions of trover

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(*a*) *Cowp.* 639.

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brought by the aſſignees of a bankrupt for property belonging to the bankrupt they ſtate that they were poſſeſſed. It is not neceſſary however to decide theſe points in this caſe, and therefore I avoid giving any poſitive opinion upon them: but as ſeveral caſes have been cited, I have thought it right to throw out theſe doubts leſt whenever the queſtions ſhould ariſe again it may be ſuppoſed that I have acquieſced in theſe determinations. But on the firſt part of the caſe, I am of opinion that the property was never deveſted out of the defendant, that the liability to repair the ſhip reſulting from that property ſtill remains in him; and conſequently that judgment muſt be given for the plaintiff.

ASHHURST, J. The act of parliament ſays that unleſs the certificate of regiſtry be faithfully recited in the bill of ſale, the bill of ſale ſhall be utterly void to all intents and purpoſes: then is the certificate accurately inſerted in the conveyance from the defendant to *Wharton*? certainly not: and if the act is to have any operation at all it avoids this deed; the conſequence of which is that the property of a moiety in the ſhip ſtill remains in the defendant. And though the defendant might have pleaded in abatement that *Wharton* ought alſo to have been ſued, yet not having ſo pleaded he cannot now take advantage of that objection. It is not neceſſary to go into the other points that have been made, this alone being deciſive againſt the defendant.

GROSE, J. No contract is found by the ſpecial verdict ſo as to ſupport the promiſe laid in the declaration: but it is argued on the part of the plaintiff, that this is a caſe in which the law will imply a promiſe by the defendant. The action is for work and labour done to a ſhip, one half of which had belonged to the defendant before the repairs were done. And the firſt queſtion that ariſes is, whether or not the defendant continued the owner at that time notwithſtanding his conveyance to *Wharton*. It is true that we decided in one caſe that a mere clerical error did not vitiate the bill of ſale: but conſidering the object of the Legiſlature in paſſing this act and the words of the ſtatute it is impoſſible to ſay that the bill of ſale contains a true and accurate recital of the certificate of regiſtry; and then the act ſays that ſuch a bill of ſale is a nullity. The next queſtion that was made is whether this law ſhall attach as between the defendant and a third perſon, not party to the bill of ſale; it has been argued that though the objection ariſing from the act of parliament be deciſive as between the parties themſelves, it is not ſo as between third perſons.

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perſons. Now it muſt be obſerved that the words of the act are that the bill of ſale ſhall be *void to all intents and purpoſes*. I remember the caſe alluded to of the action for enticing away the apprentice: but that was decided on this ground that the Legiſlature intended that ſuch indentures ſhould be voidable only and not void; but here I think that the intention of the Legiſlature would be defeated by a determination that a bill of ſale, not conformable to this act of parliament, is only voidable at the election of the parties. To be ſure in ſome views of this queſtion, the conſequences of our determination may be highly prejudicial to the defendant; he muſt be liable to all the burdens as owner, and if the maſter of this ſhip had run down another veſſel the defendant might have been anſwerable to a great amount. But on the other hand if this ſhip had had a letter of marque and had taken a prize, the defendant would have been entitled to a ſhare of the prize: then if he be entitled to the profits of the ſhip, he ought alſo to be liable for the repairs; the maxim applies qui ſentit commodum ſentire debet et onus. On account of the hardſhip of the defendant's ſituation it is with great difficulty that I have brought myſelf to be of opinion with the plaintiff: for whatever my wiſhes may be in favor of the defendant, I am not warranted in deciding in his favor; that would be to repeal the law; it would be ſaying that this bill of ſale ſhall be valid to ſome purpoſes when the Legiſlature have ſaid that it ſhall be void to all intents and purpoſes.

LAWRENCE, J. It is clear that the aſſignment by the defendant to *Wharton* is not a legal aſſignment, on account of the defects in the recital of the certificate of regiſtry. As between thoſe two perſons the defendant might have called on *Wharton* for an account of the profits of the ſhip; if he had filed a bill in equity for that purpoſe, it would have been no anſwer to have ſet up this bill of ſale which is void by the act of parliament. Conſidering it in that light, the defendant ſeems liable to the repairs of the ſhip on this ground that if one part-owner ſuffers the other part-owners to employ a perſon to repair their ſhip, he is bound by their acts. The part of the caſe, on which I doubted was, the argument that aſſerted that the bill of ſale is only void as between the parties themſelves; for the words of the ſtatute of *Elizabeth*, referred to, are as ſtrong as thoſe uſed in this act; and in the conſtruction of that act of parliament it has been holden that indentures contrary to it are only voidable. I do not diſtinctly recollect the ground on which thoſe caſes were decided: but

but if they proceeded on this ground that it was the intention of the Legiſlature that ſuch indentures ſhould only be voidable, they may be diſtinguiſhed from this caſe; for I think we ought to give full effect to this act of parliament, the proviſions of which are ſo highly beneficial to the country.

Judgment for the plaintiff.

The KING *againſt* GEORGE CROSSLEY one &c.

Tueſday, June 20th.

An indictment for perjury aſſigned on an affidavit ſworn before the Court need not ſtate, nor is it neceſſary to prove, that the affidavit was filed of record or exhibited to the Court or in any manner uſed by the party.

Perjury may be aſſigned upon an affidavit of an attorney of the court made in anſwer to a charge exhibited againſt him in a ſummary way for having in his poſſeſſion blank pieces of paper with affidavit ſtamps and the ſignatures of a Maſter Extraordinary in Chancery and another perſon at the bottom of the papers.

It is no objection to ſuch an indictment that it is not ſtated where the court was holden when the original application was made, or when the rule was made calling on the defendant to anſwer the charge, a ſufficient venue being laid to the fact of taking the falſe oath.

THIS was an indictment againſt the defendant for perjury, which ſtated that in *Eaſter* term 36 *Geo.* 3. *Thomas Stokes* made a certain application to the Court of our lord the now king before the king himſelf againſt *G. Croſſley*, *W. Clarke* and *T. Briarly*, he the ſaid defendant before and at the time of making the ſaid application being one of the attornies of the ſaid court &c. to wit at *Weſtminſter* in the county of *Middleſex*. That on *Friday* next after one month from *Eaſter-day* in the thirty-ſixth year aforeſaid the ſaid *T. S.* upon the affidavit of himſelf and others named, and a certain paper-writing thereunto annexed being read by the ſaid Court &c, obtained a rule &c againſt the defendant, *W. C.*, and *T. B.* whereby it was ordered that they on notice &c ſhould on &c anſwer the matters contained in the ſaid affidavits, and attend the ſaid court in perſon at the time of anſwering as aforeſaid. The indictment then ſet forth the ſubſtantive charge in *Stoke*'s affidavit, which was that he had found in the defendant's poſſeſſion a ſheet of paper having the proper ſtamp for affidavits thereon, with the name *W. Clarke* written thereon at the left ſide of the paper, and the name and words "*Thomas Briarly*, a Maſter Extraordinary in Chancery" written on the right ſide of the paper, and no other writing thereon. It then ſtated another rule of Court made on *Saturday* next after the Morrow of the Aſcenſion &c in the thirty-ſixth year aforeſaid, ordering that the third day of the then next term ſhould be further peremptorily given to the defendant, *W. C.* and *T. B.*, to anſwer the matters contained in the affidavit in the ſaid rule &c and attend the ſaid court in perſon. And "that the ſaid defendant contriving and intending to ſtop the courſe of public juſtice on 30th *May* in the thirty-ſixth year aforeſaid did come

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in his own proper perſon to the court of our ſaid lord the king before the king himſelf, the ſaid court then being at *Weſtminſter* in the county of *Middleſex*, and did then and there produce to the ſaid Court a certain affidavit in writing of him the defendant to be exhibited to the ſaid Court for the purpoſe of diſcharging the ſaid rules, and then and there before the ſaid Court was duly ſworn and took his corporal oath &c that the contents of the ſaid affidavit of him (the defendant) were true, the ſaid Court then and there having a lawful and competent authority to adminiſter the ſaid oath of the ſaid defendant and to take and receive his ſaid affidavit. That the ſaid defendant being ſo ſworn &c. did then and there, to wit, on the ſaid 30th of *May* in the thirty-ſixth year &c. at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex* in and by his affidavit aforeſaid upon his oath aforeſaid before the ſaid Court, the ſaid Court then and there having a lawful authority to adminiſter the ſaid oath &c and to receive his ſaid affidavit falſely and corruptly &c depoſe and ſwear" &c. The indictment then ſet out the defendant's affidavit in anſwer (*a*) to the rule then depending againſt him, and the ſeveral aſſignments of perjury thereon; concluding "and ſo the jurors &c ſay that the defendant on the ſaid 30th *May* &c. at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex* before the ſaid Court of our ſaid lord the king before the king himſelf, the ſaid Court then and there having competent authority to adminiſter the ſaid oath &c. by his own act &c in and by his affidavit aforeſaid &c. did falſely &c commit wilful and corrupt perjury againſt the peace &c."

The defendant having been found guilty upon this indictment, and being brought up to receive judgment in the laſt term, offered ſeveral objections (*b*) in arreſt of judgment. 1ſt, It is ſtated in the indictment that *T. Stokes* made an application to the Court of our lord the now king &c againſt the defendant, *W. C.* and *T. B.*; but it is not alleged that the ſaid court was then held at *Weſtminſter* or elſewhere; what follows, namely, "at *Weſtminſter*" &c. being merely applied to the allegation of the defendant's being one of the attornies of the court, and the ſame objection

applies

(*a*) The defendant by this anſwer attempted to get rid of the preſumption of mal-practice againſt him on account of his poſſeſſion of ſuch an inſtrument, by ſtating that it had been put into his hands many years before to be uſed as an affidavit in a certain cauſe then depending.

(*b*) Theſe objections and ſome others, which have no foundation in fact are omitted, were drawn up in writing by the defendant himſelf, and by him preſented to the Court; the ſubſtance of them only is preſerved.

applies to other parts of the indictment where the Court is mentioned in particular. It does not appear by the record where the Court was held at the time when the rule was made, calling upon the defendant to anſwer to matters contained in the ſaid affidavit: nor is there any venue to this part of the indictment. 2dly, The indictment does not ſhew that the affidavit of the defendant was made in any legal proceeding: and the Court have no right to call on the defendant ſummarily to anſwer any complaint againſt him merely becauſe he is an attorney, unleſs in a caſe touching the defendant's office as an attorney in his conduct towards ſome of the ſuitors of the court, or for a breach or contempt of ſome rule or order of the Court, or for ſome matter touching the proceedings or proceſs of the Court, none of which are ſtated; or if the paper found in the defendant's cuſtody could have been the object of a ſummary inquiry, not having been uſed or attempted ſo to be, nor having a proper ſtamp, it could only have been in the court of Chancery, where the paper could have been uſed if at all, and not in the court of King's Bench; wherefore all the proceedings reſpecting it are coram non judice, and cannot be the ſubject of an indictment for perjury. 3dly, Where any matter of record of the Court is referred to in an indictment of this ſort, it is uſual to add "as by the record thereof now remaining *affiled* in the ſaid "court &c. doth appear," or the like; but there is no ſuch reference in the preſent indictment. 4thly, No venue is laid to the fact of the defendant's ſwearing the affidavit on which the perjury is aſſigned.

To theſe objections, which were not argued at the bar, another was added by

Erſkine, *Garrow* and *Manley*, on behalf of the defendant; that it did not appear that after the affidavit, on which the perjury was aſſigned, was ſworn by the defendant it was exhibited in this court or filed. It was indeed ſtated that the defendant did *produce to the Court a certain affidavit to be exhibited* &c: but it plainly appears from what follows that the paper-writing (there improperly called an affidavit) was not ſuch at that time, but became ſo afterwards by the defendant's being ſworn to the truth of the facts contained therein; and after the time when only it could properly be ſtyled an affidavit it does not appear to have been filed or in any manner exhibited or made

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uſe of by the defendant in court. They admitted that if the crime of perjury could be committed merely by ſwearing to a falſe affidavit, although no uſe were afterwards made of it in a judicial proceeding, then this objection failed; but if that were not ſo, it followed neceſſarily that there ought to be an averment in the indictment that it was uſed or filed of record, without which perjury could not be aſſigned thereon. That this appeared as well from the common practice of counſel in adviſing their clients not to make uſe of affidavits the truth of which they had reaſon to doubt, and keeping them from the files of the court to avoid expoſing the ſwearers to the peril of an indictment for perjury, as alſo from the general form of the precedents, which either ſtate that the affidavits on which perjury is aſſigned were *exhibited* or *produced* before the Court, or refer to them as filed of record, which ſuppoſes them to have been uſed or read in court. *R.* v. *Croſs*, *Trem. P. C.* 136. *R.* v. *Jole*, *ib.* 138. *R.* v. *Brooks*, *ib.* 151. 155. And they alſo cited *R.* v. *Taylor*, *Skin.* 403, *Holt*'s *Rep.* 534. where on an indictment for perjury in making an affidavit *Holt* Ch. J. ruled at *Guildhall*, "that it ought to be proved that the affidavit was read and uſed againſt the party, for without producing and uſing it the bare making an affidavit will not be ſufficient (*a*)."

Milles and *Dauncey*, *contrà*, were ſtopped by the Court.

Lord Kenyon, Ch. J. The argument in arreſt of judgment only ſhews that there are ſome precedents of indictments for perjury in the books containing words that are not inſerted in this indictment. But that argument proves too much, becauſe it tends to prove that all ſubſequent indictments muſt contain all the nonſenſe that has been inſerted in the precedents drawn of late years.

Let us examine the foundation of this objection on principle, on practice, and on the precedents. Firſt as to principle: This proſecution affects to bring to juſtice a perſon who has been guilty of a moſt enormous offence: his guilt or innocence muſt depend on his own act and on the motive by which he was actuated at the time. The affidavit, on which the perjury is aſſigned, might have been ſworn in a diſtant part of the kingdom; it might have been ſent up by the poſt, and detained in the hands of any perſon

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(*a*) It appears upon reference to the record of this caſe which is of *Mich.* 5 *W.* & *M.* Roll 9. that the indictment concluded contra formam ſtatuti &c.

here

here for ſome time; and according to the doctrine urged on behalf of the defendant the guilt or innocence of the perſon making the affidavit in the country is to depend on the circumſtance of the perſon into whoſe hands it comes bringing it forward. But ſurely the guilt of the party cannot depend on the act of another perſon, when all that he had to do has been already conſummated. In the inſtance of making an affidavit in the country, the party is not to be indicted here where the affidavit may happen to be uſed, but in the county where the offence was complete by making the falſe oath. Then the practice has been referred to, and it is ſaid that counſel have ſometimes recommended it to the party who has made the affidavit not to produce it in court but to put it into his pocket: in one ſenſe it may be of great importance to the party to put his affidavit into his pocket, to prevent it's being produced in evidence againſt him on an indictment for perjury: but it is ridiculous to ſuppoſe that his guilt or innocence can depend on ſuch an act. With regard to the precedents; it is admitted that there are many, on which the parties have been convicted, in which it is not ſtated either that the affidavit was exhibited or filed in court. On looking into the precedents referred to in *Hawkins* I was at firſt ſtartled, ſeeing that they alleged that the affidavit had been exhibited or filed: but they are all on the ſtatute, and are therefore diſtinguiſhable from this caſe, for there an action is given to the party injured by the falſe oath. I am therefore of opinion that there is no foundation for this or for any of the other objections, which we have conſidered though they have not been argued.

Ashhurst, J. declared himſelf of the ſame opinion.

Grose, J. Whether we conſider this caſe on principle, the definition of the crime of perjury, or the practice, I think there is no foundation for this objection. There is no precedent in which it is alleged that the affidavit was uſed. It is indeed ſtated in ſome of them that it was exhibited by prout patet per recordum &c: but that is not neceſſary.

Lawrence, J. Several objections have been made to this indictment, all of which except one have now been given up by the defendant's counſel. Had they been argued, I think I could have given ſatisfactory reaſons to ſhew that none of them could be maintained. With regard to the objection relied on by the defendant's counſel; I think that the crime of perjury was complete by the defendant's ſwearing the affidavit for the purpoſe of

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diſcharging the rule againſt him, and that the crime cannot depend on the ſubſequent uſe of it, the defendant being equally guilty of perjury though no uſe had been afterwards made of it. The caſe in *Skinner* was an indictment on the ſtatute (*a*), and therefore it cannot govern this caſe. I have looked with great attention through a variety of precedents, manuſcript as well as printed, and I do not find that it was ſtated in any one inſtance that the affidavit was uſed. It is ſtated in them that when the party ſwore he exhibited the affidavit to the perſon or the Court before whom it was ſworn, and that the contents of it were falſe; the common form is, that he came before the perſon or the Court, and exhibited the affidavit or paper-writing, that perſon or Court having competent authority &c, and that he ſwore falſely and corruptly ſuch and ſuch things, without adding that any uſe was afterwards made of the affidavit; and then it proceeds to ſet out the aſſignments of perjury. Then it was ſaid that all thoſe caſes may be diſtinguiſhed from the preſent, becauſe it appears in them that the affidavit was exhibited *as appears by a reference to the files of the court.* But the principle is that whatever is material to the eſſence of the crime cannot be ſupplied by intendment: then is not the uſe made of the affidavit (if at all) to be ſupplied by intendment? A reference is made to the files of the court to ſee what was done, and from thence it is to be intended that the party uſed the affidavit: but that is contrary to the general rule that no material thing is to be intended; from which it follows that this kind of reference does not ſupply what the defendant's counſel ſay is neceſſary to be averred, becauſe that would be to ſupply it by intendment. But even that reference is not always made; it was not either in *R.* v. *Hawkins*, *Trem. P. C.* 167, or in *R.* v. *Stone*, *ib.* 148. I have alſo directed a ſearch to be made in the Crown-office for precedents of indictments of this kind: it is not alleged in any one of the nine that I have ſeen that any uſe was made of the affidavit; and in four of them there is no reference to any affidavit on the files of the court. And in the caſe of *R.* v. *C. Atkinſon* (*b*) which was very much examined both by the bench and at the bar the indictment was drawn in this form, and this objection was not even taken.

Rule diſcharged.

(*a*) This appeared from the indictment on the records of the court.

(*b*) *E.* 24 *Geo.* 3. *B. R.*

Clarke *againſt* Cawthorne.

Wedneſday, June 21ſt.

The Court refuſed to diſcharge a defendant out of cuſtody on the ground that the affidavit on which he had been holden to bail was entitled in the cauſe.

In an affidavit to hold to bail in trover for a bill of exchange it ſhould be ſtated that the bill remains unpaid.

THE defendant had obtained a rule calling on the plaintiff to ſhew cauſe why he ſhould not be diſcharged out of cuſtody, for the inſufficiency of the affidavit on which he had been arreſted. The affidavit, which was entitled in the cauſe, ſtated that "the defendant has or lately had in his poſſeſſion a certain bill of exchange of the plaintiff's dated &c, drawn by one *W. Martin* upon and accepted by Meſſrs. *Alcock* and *Milner* for the payment of 65*l.* to the plaintiff one month after date, which ſaid bill of exchange the ſaid defendant on demand thereof refuſed to deliver to the plaintiff, but on the contrary has converted and diſpoſed of the ſame to his own uſe."

The firſt objection was that the affidavit was entitled in the cauſe. But

The Court thought that as the practice (*a*) had obtained ſo long of adding a title to affidavits of this kind it would be too much now to determine that ſuch practice had been erroneous, particularly as this was a mere queſtion of form and did not interfere with the juſtice of the caſe; and that the conſequences of ſuch a determination would be that it might occaſion an infinity of actions for improperly holding to bail in thoſe caſes in which the affidavits had been entitled: but that for the regulation of future practice they would make a rule of court ordering that affidavits to hold to bail ſhould not be entitled after this term.

Another objection was then taken to the affidavit that it ought to have ſtated a cauſe of action to the extent ſuggeſted in the affidavit: whereas here conſiſtently with what was ſworn the defendant might not have converted any thing to his uſe of the value ſtated; for though it was ſtated that the bill of ex-

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(*a*) In the laſt term ſimilar rules were obtained in two cauſes, *Levi* v. *Roſs*, and *Gaunt* v. *Marſh*, on a ſimilar objection. On enquiry it then appeared that it had been the practice for a great length of time to uſe affidavits to hold to bail that were and that were not entitled indiſcriminately; that there were nearly as many in the office of the one kind as of the other. *The Court*, thinking it a point that concerned the practice of all the courts, ſaid that they ſhould defer giving any opinion until they had had an opportunity of conſulting the judges of the other courts. But as ſoon as the above caſe of *Clarke* v. *Cawthorne* was diſpoſed of, they diſcharged the rules in both theſe caſes. In ſupport of thoſe rules were cited *R.* v. *Jones*, 2 *Str.* 704; *R.* v. *Pierſon, Andr.* 313; *Bevan* v. *Bevan*, *ante*, 3 vol. 601; *R.* v. *Harriſon*, *ante*, 6 vol. 60; and *R.* v. *Almon*, cited *ante*, 6 vol. 642. note. Againſt the rules was cited *King* q. t. v. *Coles*, *ante*, 6 vol. 640.

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change purported to be of a certain amount, it did not appear but that the bill might have been paid. And

The Court, being of opinion that this objection was fatal, made the

Rule abſolute.

Lawes in ſupport of the rule. *Conſte* againſt it.

Friday, June 23d.

Weakley on the Demiſe of Knight and Ann his Wife *againſt* J. Rugg.

A., having three daughters *B. C.* and *D.*, by will gave a ſmall legacy to *B.* and *C.*, and then gave a leaſehold eſtate to *D.* "but if ſhe died without *having* child or children" then "to *B.* and after her to her child or children:" *D.* had a child who died in her lifetime:—held that *D.* took the abſolute intereſt in the term, and conſequently that ſhe might diſpoſe of it by will.

On the trial of this ejectment for leaſehold premiſes in *Milverton* before Mr. J. *Buller* at the laſt aſſizes for *Somerſetſhire* a ſpecial caſe was reſerved for the opinion of this Court.

W. Owen, poſſeſſed of the remainder of a term for 1000 years, having three daughters *B. Chilcott*, *Mary Owen*, and *Ann Owen*, by will dated 13th of *October* 1750, after giving 5*s.* to his eldeſt daughter, and 5*l.* to *Mary*, gave the premiſes in queſtion "to his daughter *Ann*, but if ſhe ſhould happen to die without *having* child or children lawfully begotten, then he willed that the ſaid premiſes ſhould be and remain to his daughter *Mary*, and after her to ſuch child or children as ſhe ſhould happen to have lawfully begotten;" and he appointed his daughter *Ann* executrix and reſiduary legatee. *Ann* entered after the death of her father, and married *W. Rugg* in *September* 1753, by whom ſhe had three children, who as well as the huſband died in *Ann*'s lifetime. *Ann* afterwards by will gave the whole to her ſiſter *Mary* (who is ſince dead) for life, remainder to *Ann Knight* one of the leſſors of the plaintiff and who was a daughter of *Mary*. The queſtion reſerved was whether *Ann*, the daughter of *W. Owen*, took the whole intereſt in the term; if ſhe did the verdict was to be entered for the plaintiff for the whole: if not, a verdict was to be entered for the plaintiff for an undivided fourth part, *Ann* one of the leſſors of the plaintiff being in that caſe entitled to a fourth as one of the children of *Mary*.

Dampier for the plaintiff. The words of the bequeſt to *Ann* being ſufficient to paſs the whole intereſt in the term, it is incumbent on the defendant, in order to reſtrain thoſe words, to ſhew that the preciſe event on which the bequeſt over was to take effect has happened. It is given to *Ann* generally, but if ſhe die

without

without *having* a child or children, then it is given over to *Mary and to her children.* The conſtruction which the defendant attempts to put on theſe words is, to ſubſtitute the word "leaving" for *having*, and then to imply an intention in the teſtator from the word ſo ſubſtituted and add to the words "having a child or children" theſe words "living at the time of *Anne*'s death." Before ſo forced a conſtruction can however be put on the words the Court ought to be ſatisfied that ſuch was the intention of the teſtator: but on conſidering the ſituation of his family and the whole will, the contrary appears to have been his intention. *Anne* ſeems to have been the favourite daughter; this eſtate is firſt given to her ſhe being then unmarried, and ſhe is alſo the reſiduary legatee. Now there is no bequeſt to *Anne*'s children, though there is to *Mary*'s; and if *Anne*'s children had been living at the time of their mother's death, they could not have taken any intereſt but by the bounty of their mother. The intention therefore of the teſtator ſeems to have been to give the whole intereſt to *Anne* to enable her to diſpoſe of it for the benefit of her children either in her lifetime or by her will. And unleſs ſhe had this power if ſhe had had a child who died in her lifetime leaving a a child, ſuch grandchild could not have taken any thing, and the whole would have gone over to *Mary* and her children: whereas the intention ſeems to have been to poſtpone *Mary*'s family until after *Anne*'s; and that *Mary*'s ſhould not take as long as there were any deſcendants of *Anne.* The words "child or children" here are equivalent to *iſſue.* But even if the whole intereſt did not paſs *immediately* to *Anne,* ſhe took it abſolutely on the ſubſequent birth of a child; when ſhe had a child the event on which the eſtate was given over became impoſſible; for the only event on which it was given over was *Anne*'s dying without ever having had a child. In *Goodiar* v. *Clarke* (*a*) *Wyndham* J. mentioned the caſe of *Brett* v. *Pildridge;* "a father on the marriage of his daughter made a proviſo that if his daughter died without iſſue within two years, the huſband ſhould repay 500*l.* of her portion; the daughter had iſſue, and afterwards ſhe and her iſſue died within two years;" and it was adjudged that the huſband ſhould not repay the 500*l.*, for by having iſſue the condition was performed.

Jekyll for the defendants. The deviſe over to *Mary* took place on the event of *Anne* dying without any children. Such

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(*a*) 1 *Sid.* 102.

appears to have been the intention of the teſtator, and ſuch is the grammatical conſtruction of the words of the will. In *Read* v. *Snell* (*a*) where the queſtion aroſe on the conſtruction of the words "in caſe my daughter ſhall die *leaving* no heirs of the body," The Lord Chancellor held that as "*leaving*" was a participle of the preſent tenſe it related to the time of the daughter's death. So here "having" is a participle of the preſent, and equally relates to the time of *Anne*'s death. In *Beauclerk* v. *Dormer* (*b*) where the words were "if ſhe die without iſſue *then* to go to Lord *G. Beauclerk*," The Lord Chancellor laid much ſtreſs on the word *then*. In *Porter* v. *Bradley* (*c*) the deviſe was to *A.* and his heirs, and if he die leaving no iſſue behind him, then over; and Lord *Kenyon* ſaid "if indeed only the firſt words 'leaving no iſſue' had been uſed, they according to the opinion of Lord *Macclesfield* in *Forth* v. *Chapman* muſt be reſtrained to *leaving iſſue at the time of his death*." In *Hughes* v. *Sayer* (*d*) the bequeſt was to *Paul* and *Ann* "and upon either of their dying without children then to the ſurvivor," and it was holden that thoſe words muſt mean "dying leaving children at the death of the party." So in *Lampley* v. *Blower* (*e*), where the bequeſt was to *A.* and *B.* and to their iſſue, and if either of them happen to die before the legacy becomes due to her, and *leave no iſſue*, the ſhare of her ſo dying ſhall go to the ſurvivor, it was ruled that it was confined to "leaving no iſſue at the time of their death." *Gulliver* d. *Wykes* v. *Aſhby*, 1 *Bl. Rep.* 607. It does not appear that the teſtator intended any benefit to *Anne*'s children, and conſequently the contemplation of their intereſt can have no weight in increaſing their mother's eſtate; they are not even mentioned in the will; and to conſtrue the word *having* to mean *having had* a child will not only be to determine againſt the grammatical conſtruction of the word but on a preſumption of intention in the teſtator which the words of the will do not warrant.

Dampier in reply. The caſes cited, in which the word "leaving" was uſed, are not applicable to the preſent, becauſe that word neceſſarily refers to the time of the death, but the word "having" does not. There is no caſe in which it has been holden that "*having* children" ought to be reſtrained to "*leaving* children;" and here the intention of the teſtator, as it may be collected

from

(*a*) 2 *Atk.* 647.
(*b*) *Ib.* 308.
(*c*) *Ante*, 3 vol. 143.
(*d*) 1 *P. Wms.* 534.
(*e*) 3 *Atk.* 396.

from other parts of the will, is againſt ſuch a determination. In *Porter* v. *Bradley* the words "behind him" were added to "leaving." And in *Hughes* v. *Sayer* it was expreſsly given over to the *ſurvivor*, which ſhewed an intention in the teſtator to reſtrain it to iſſue living at the death of the perſon who firſt died.

Lord Kenyon, Ch. J. Before we determine this caſe we muſt ſatisfy ourſelves as well as we can of the teſtator's intention. Let us look at the general plan of the will, and ſee what conſtruction will beſt effectuate it. His intention ſeems to have been this, that the progeny of *Anne* ſhould be firſt provided for, and, that failing, that the eſtate ſhould then go over to his daughter *Mary* and her children: but it is clear that he did not know the exact meaning of legal limitations. According to the defendant's conſtruction of the will, when *Anne* died without leaving children living at the time of her death, the eſtate was at all events to go over to *Mary*, whatever might have been the circumſtances of *Anne*'s family before; and then if *Anne* had had a child who died in her lifetime leaving children, thoſe great-grandchildren of the teſtator, the grandchildren of that daughter for whom he had a predilection, could not have taken at all; in that caſe the favourite daughter would have been in a worſe ſituation than either of the other daughters. There is no limitation over to the children of *Anne*, and if ſhe had died leaving children, there is nothing imperative on *Anne* to leave the eſtate to thoſe children, but ſhe might have left it to whomſoever ſhe pleaſed. But in the next limitation, the eſtate is given to *Mary* and to her children; and it is clear that if the prior limitation to *Anne* had been out of the way, the inſtant *Mary* had a child the eſtate would have veſted in that child without any regard to ſuch child ſurviving his mother *Mary*, and in the event of ſuch child dying before *Mary*, *Mary* would have been entitled to take out adminiſtration to him. In the caſe of a conditional fee-ſimple at common law, the parent on the birth of a child had the jus alienandi; the condition was thereby performed, and the eſtate was alienable prior to the ſtatute de donis. In this caſe we determine according to the general intention of the teſtator, which was that the family of *Anne* ſhould be firſt provided for, and that the children of *Mary* ſhould not take until failure of *Anne*'s children. Perhaps he did not foreſee this particular event: but we muſt not on that account put a conſtruction on the will that would have diſappointed the teſtator in the moſt important part of his whole ſcheme. I think therefore that I am bound to put that conſtruction

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WEAKLEY *againſt* RUGG.

ſtruction on the will that the plaintiff contends for; which is alſo the fair grammatical conſtruction, for the meaning of the word "leaving" is eſſentially different from that of "having."

ASHHURST, J. The defendant's is a forced conſtruction of this will. *Anne* was the favourite daughter of the teſtator; ſhe was the great object of his bounty. The teſtator firſt gave this eſtate to his daughter *Anne*, without adding any other words to that bequeſt; then he proceeded thus, "but if ſhe ſhall die without *having* a child &c" then to *Mary* and her children: but it cannot be ſuppoſed that he intended to give a leſs eſtate to *Anne*, who was his favourite daughter, than to *Mary* who was not. This being the caſe of a term, a bequeſt of the eſtate to *Anne* carried the whole intereſt, and that was only to be diveſted by a ſubſequent event which has not happened; therefore it remained to her abſolutely.

GROSE, J. The conſtruction relied on by the plaintiff ſeems moſt conſiſtent with the teſtator's intention. The teſtator had three daughters, the youngeſt of whom (*Anne*) he ſelected as the chief object of his bounty. The eſtate was given to her, without ſaying "for her life" and without giving it afterwards to her children: but it was afterwards given to *Mary and to her children*, which ſatisfies me that *Anne* was to have the power of diſpoſing of it among her children if ſhe choſe, for he intended that *Anne* and her children ſhould have at leaſt as much benefit from this eſtate as *Mary* and her children; and if *Anne* were to have the power of diſpoſing of the eſtate for the benefit of her children, ſhe muſt take the whole intereſt in order to enable her to do ſo.

LAWRENCE, J. Perhaps the general intention of the teſtator will be beſt conſulted by this determination. At the ſame time I confeſs it ſtruck me at firſt that this was a gift to *Anne*, and in caſe ſhe left any children that ſhe ſhould have the power of diſpoſing of it abſolutely, the teſtator taking it for granted that ſhe would provide for thoſe children, but if ſhe *left* no child then that the eſtate ſhould go to *Mary* and her children. That is the grammatical conſtruction of the will; "having" refers to the time of the death; whereas according to the plaintiff's argument that word muſt be read "having *had*." However the teſtator's intention ſeems to have been firſt to provide for *Anne*'s family, truſting when he gave the eſtate to her that ſhe would diſpoſe of it properly among them. In the event of *Anne*'s having children it might have been deſirable to provide for them during *Anne*'s lifetime, but that object would have been defeated if *Anne* had had no power of diſpoſing of the eſtate until the time of her death. Conſidering therefore that it was the teſtator's intention that *Anne* ſhould take the whole intereſt in this eſtate if ſhe had children though they did not exiſt at the time of her death, in order to further that intention the beſt conſtruction that we can put on the will is to decide that this eſtate veſted abſolutely in *Anne* in the event of her having a child at any time; and conſequently that the plaintiff is entitled to recover for the whole.

Poſtea to the plaintiff.

GOODRIGHT on the Demiſe of BALCH *againſt* RICH and GOVETT.

Friday, June 23d.

The leſſor of the plaintiff in ejectment is bound at the trial to prove the defendant in poſſeſſion of the premiſes which he ſeeks to recover, altho' the defendant has entered into the general conſent rule to confeſs leaſe entry and ouſter, if the defendant conteſt his poſſeſſion.

EJECTMENT for thirty acres of land, twenty acres of meadow, and twenty acres of paſture, with the appurtenances, ſituate in the pariſhes of *Over Stowey* and *Nether Stowey* in the county of *Somerſet*. The defendants pleaded the general iſſue, and entered into the common conſent rule as tenants. The cauſe was tried before Mr. Juſtice *Buller* at *Taunton*, when a verdict was found for the plaintiff, ſubject to the opinion of this Court on the following caſe. The leſſor of the plaintiff proved his title to certain lands in the pariſhes mentioned in the declaration of ejectment, which lands were called *Clutſome's*, *Dunſcombe's*, *Landſey's Breach*, *Criddle's Breach*, and the *Gore Platt*, which were the premiſes in queſtion. The defendants proved that they were not, nor ever had been, in poſſeſſion of any part of the premiſes in queſtion. The only point reſerved at the trial was, whether the defendants after entering into the conditional rule could be permitted to prove that they neither were or had been in poſſeſſion of the premiſes, which the plaintiff by the evidence had entitled himſelf to. If ſuch proof on the part of the defendants were admiſſible, a nonſuit was to be entered; otherwiſe the verdict was to ſtand.

Praed for the leſſor of the plaintiff. The leſſor of the plaintiff having declared generally as he had a right to do, and having at the trial proved his title to lands anſwering the general deſcription in the declaration, and the defendant not having ſhewn a title to any other lands anſwering the ſame deſcription, the queſtion is

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whether the latter is not concluded by having entered into the general conſent rule from diſputing his poſſeſſion of the lands ſo deſcribed and proved to be the property of the leſſor. Two preliminary objections were made when this caſe firſt came before the Court (*a*). Firſt, that the leſſor of the plaintiff could not avail himſelf of any judgment in this caſe in his favour. Anſwer—That though a term for which an ejectment is brought be expired before judgment, ſo that the plaintiff cannot have the benefit of his judgment to recover the term, yet he may enter it for the damages and coſts. And he cited precedents of ſuch judgments in *Book of Judgments*, 1 vol. 82. 2 vol. 118. *Gilbert's* (*b*) *Law and Practice of Ejectments* 307. [and this was aſſented to by the Court]. Nor is it neceſſary, even if the judgment were entered to recover the term as well as the damages and coſts, that the plaintiff ſhould maintain his whole judgment; for upon error brought it may be affirmed in part and reverſed in part. Secondly, that as the leſſor of the plaintiff muſt in the outſet of the proceedings have procured an affidavit of ſervice of the declaration on the tenant *in poſſeſſion*, without which he could not have proceeded in the action, he is eſtopped from contending that it is immaterial whether the defendant were or were not in poſſeſſion. Anſwer—The rule requiring ſuch an affidavit is only for the purpoſe of enabling the leſſor to enter up his judgment againſt the caſual ejector: but it does not apply when the tenant or any other claiming title for him comes in and defends his poſſeſſion, and thereupon enters into the conſent rule; and this queſtion ariſes upon the operation and effect of ſuch conſent rule as evidence at the trial between the litigating parties, and not upon the queſtion of regularity in the previous proceedings. Other evidence too of poſſeſſion would be admiſſible at the trial, which certainly would not be ſufficient to warrant a judgment againſt the caſual ejector; *ex. gr.* the acknowledgment of the party to the conſent rule that he was in poſſeſſion of the premiſes for which the plaintiff went; and yet that would not be ſufficient to ſupport a judgment againſt the caſual ejector; becauſe it would let in all that fraud and colluſion which the rule requiring the affidavit of ſervice was intended to prevent. Beſides, there is no more reaſon

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(*a*) This was in the laſt term, when the ſtatement of the caſe was ordered to be amended.

(*b*) Note; this book which is intitled "The Law and Practice of Ejectments" is aſcribed to Lord Chief Baron *Gilbert*, Vid. Preface to *Runnington's Law of Ejectments*.

why

why the affidavit of ſervice ſhould conclude the party in this caſe than the affidavit to hold to bail does the plaintiff in bailable actions; yet it never was conſidered that a plaintiff in the latter caſe was bound to prove his demand up to the full extent of the ſum which he had before ſworn to be due, or that he was eſtopped from proving any more due to him from the defendant. So in *Parry* v. *Dawſon* (*a*), the plaintiff having held the defendant to bail for goods ſold and delivered was held to be no objection againſt ſuing him in trover for the ſame goods. Suppoſe in this caſe a wrong perſon had been ſerved with a copy of the declaration by miſtake, but the real tenant had come in and defended, the affidavit of ſervice would not be held to conclude the leſſor of the plaintiff from proving the defendant in poſſeſſion: and if not, there is no more reaſon why he ſhould be eſtopped by it from inſiſting on the operation of the conſent rule to preclude the neceſſity of that proof. Then as to the principal queſtion; the defendant who has entered into the conſent rule is eſtopped from diſputing at the trial his poſſeſſion of the premiſes for which the ejectment is brought in a caſe circumſtanced like the preſent. This will appear from the nature of the proceedings, the practice, and the lateſt authorities. The whole proceeding is founded in fiction. The declaration againſt the caſual ejector is in very general terms. The notice from the caſual ejector ſtates that he is informed that the perſon on whom the ſervice is made is either *in poſſeſſion* or *claims title* to the premiſes; the latter of which deſcriptions has been added in modern times and was intended to apply to the caſe of landlords. This gives the party intereſted notice to come in and defend his title, otherwiſe he will be turned out of poſſeſſion. If no perſon appear to defend, then judgment follows againſt the caſual ejector. If any come in and defend, he muſt enter into a conſent rule to confeſs leaſe entry and ouſter; the effect and ſubſtance of which is that the leſſor has made a leaſe to the plaintiff of the premiſes which he ſeeks to recover, that he entered into poſſeſſion of the ſame, and that the defendant ejected him; and upon this condition alone the defendant is admitted to defend; and he thereby alſo ſtipulates to inſiſt upon the title only. Having therefore by the conſent rule agreed to admit theſe facts as the condition of his being let in to defend, he cannot be permitted at the trial to retract his conſent

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(*a*) *Anſtr. Rep.* 710.

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to any part. In this reſpect the conſent rule of the court of *C. B.* materially differs from that in this court, for there the confeſſion of the leaſe entry and ouſter is only "of ſo much of the tenements ſpecified in the plaintiff's declaration *as are in the poſſeſſion of the defendant* or his tenants, or any perſons claiming "by or under his title." But it is alſo in the power of a defendant in this court to avail himſelf of the ſame preciſion if he thinks fit; for by the rule of Court of *Trin.* 15 *Car.* 2. Reg. 1. where the defendant by the rule of Court ſhall confeſs leaſe entry and ouſter for ſo much of the premiſes in the declaration mentioned as are in the poſſeſſion of the ſaid defendant or his under-tenants, his attorney ſhall deliver to the plaintiff's attorney a note in writing of the tenements ſo being in his or their poſſeſſion. Where there are ſeveral defendants it appears that there are three ways of entering into the conſent rule. 1. They may all join to defend all the premiſes generally. 2. They may reſpectively defend for all the premiſes named generally; and there each enters into the rule to defend for all the premiſesin his own poſſeſſion, not diſtinguiſhing the one from the other by name. 3. Each may defend ſpecially for certain premiſes by name; and all theſe require a different conſideration. 1. In the firſt caſe they jointly undertake to defend for all the premiſes anſwering the general deſcription in the declaration to which the plaintiff can prove title. The rule of Court in the 15 *Car.* 2. does not apply to this firſt inſtance; neither does the paſſage in *Gilbert's Ejectments* 16, which may ſeem to bear againſt this conſtruction at firſt. 2. When each defends for the premiſes in his reſpective occupation generally, from the very nature of the thing the plaintiff muſt prove the reſpective poſſeſſion of each. 3. In the third inſtance there muſt be new declarations ſerved and diſtinct records made; for perſons who defend diſtinctly for different premiſes cannot be compelled to join together in their defence on the ſame record. [*Per Curiam* that cannot be neceſſary, for the conſent rule, though no part of the record, will ſhew for what each defends.] It ſo appears from the books. In *Medlicott* v. *Brueſter* and another (*a*), where on the defendants ſevering their defence by entering into the conſent rule to confeſs for diſtinct tenements in their reſpective poſſeſſion, the Court ordered the plaintiff to deliver ſeveral declarations, that if either had a good defence he might not be concluded upon the queſtion of coſts. The Court therefore muſt have con-

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(*a*) 2 *Keb.* 524. 531.

ſidered that if they permitted the leſſor of the plaintiff to declare generally, the defendants might have been compelled to defend for more than was in their reſpective poſſeſſions. But it appears from the caſe of *Oddye* v. *Preſton* (*a*) that where the leſſor of the plaintiff had inſerted a ſmall parcel of land not in diſpute in his declaration, in order to ſave the coſts, and the defendant had inadvertently entered into the rule to confeſs generally, the Court afterwards gave him leave to amend the conſent rule, which would have been unneceſſary if they had not conſidered that he would be concluded by it ſo long as it remained. The principal caſe relied on by the defendant is *Smith* v. *Mann* (*b*): but that is diſtinguiſhable from the preſent; for there the defendant entered into a rule to defend *as landlord*, which is in the ſame form as the common rule in *C. B.*; and there it was held neceſſary for the plaintiff to prove the defendant in poſſeſſion, becauſe, as the Court ſaid, *the rule is that the landlord ſhall defend for the premiſes only whereof his tenants are in poſſeſſion*. It is true that the reſolution of the Court is laid down in more general terms in *Buller's Ni. Pri.* 110., but the caſe referred to does not warrant it to that extent. And the ſame book refers to a ſubſequent caſe of *Doe* d. *Jeſſe* v. *Bacchus*, *M.* 30 *Geo.* 2. *K. B.* at the Sittings; where it was holden "that if there be but one defendant as tenant in poſſeſſion, the plaintiff need not prove him in poſſeſſion, becauſe if he be not, why did he enter into the rule." Now there can be no difference in principle whether there be one or more defendants who enter into the conſent rule generally. Beſides which, the caſe of *Smith* v. *Mann* was overruled by *Buller*, J. at *Bodmin* Sum. Aſſiſes 1791, in a caſe of *Doe* d. *Horrell* v. *Dawe*; where he held that if *the tenant* defend, it is not neceſſary to prove him in poſſeſſion, though in the caſe of *the landlord* defending it would be neceſſary to prove that his tenant was in poſſeſſion. Further, the practice which has prevailed ſeems to be warranted by adverting to the manner of pleading in treſpaſs, in the place of which the remedy by ejectment has got into uſe. Now if the plaintiff in treſpaſs declare for breaking and entering his cloſe in *D.*, and the defendant plead that the locus in quo is ſix acres of land in *D.* which are his freehold, and the plaintiff reply that they are his freehold and not the freehold of the defendant, if each have ſix acres reſpectively in *D.*, the defendant cannot give in evidence that he did the treſpaſs in his own land; but by his plea it ſhall be intended

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(*a*) 2 *Bac. Abr.* 164, 165. and 3 *Keb.* 561.

(*b*) 1 *Wilſ.* 220.

that he meant the ſix acres of the plaintiff; becauſe until he gives a name to the place where the treſpaſs was done the plaintiff need not new aſſign. *Dy.* 23. *b. pl.* 147. The conſent rule which has been introduced in ejectment anſwers all the purpoſes of the defendant's plea in treſpaſs. If he conſent generally, it muſt be taken to be an admiſſion that he is in poſſeſſion of the ſame lands for which the plaintiff declares by his general deſcription. If he have any other lands anſwering the ſame general deſcription as in the declaration, then he ought to enter his conſent ſpecially in the margin of the rule; otherwiſe he muſt be taken to mean the ſame premiſes. But whatever inconveniences might enſue from the conſtruction of the conſent rule contended for by the plaintiff, they are effectually done away by the modern practice which prevails. For if the plaintiff declare generally, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order to ſpecify them. And on the other hand the plaintiff may call on the defendant to ſpecify for what he defends when that is not aſcertained by the conſent rule; and he cited two caſes (*a*) in confirmation of that practice. Whereas the inconvenience of the rule now contended for by the defendant is manifeſt; for the plaintiff is deluded into the belief that the defendant is in poſſeſſion of thoſe premiſes for which the action is brought by his entering into the

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(*a*) DOE d. WEBB and Another *v.* HULL.—Ejectment for thirty acres of land in the pariſh of *Brackwood* in the county of *Hertford*. The landlord of the tenant in poſſeſſion took out a ſummon for a particular of the premiſes for which the ejectment was brought, and then the premiſes were deſcribed by the names of the cloſes and the quantities they contained; the landlord then appeared for thirty acres of land &c, being copyhold, held of the manor of *King's Walden*. The only queſtion in the cauſe was whether the premiſes were copyhold or freehold; for if they were copyhold, the plaintiff had no claim; ſo that the deſcribing of the premiſes as copyhold in the appearance was a trick. The leſſor of the plaintiff then ſerved the defendant's attorney with a notice for what the ejectment was brought, and that he meant to inſiſt at the trial that the premiſes never were copyhold, and took out a ſummons calling on defendant to particularize the premiſes for which he appeared; an order was oppoſed; but Mr. Juſtice *Groſe* thought the appearance unfair, and made the order.

DOE d. SAUNDERS *v.* The Duke of NEWCASTLE.—Ejectment for the manor of *Basford*, ten meſſuages, ten cottages, one thouſand acres of land &c; the defendant obtained a verdict at the Summer aſſizes 1794 for the manor. The plaintiff proved himſelf in poſſeſſion of the cottages to the number of eight, which the defendant did not claim. In *Michaelmas* term the plaintiff obtained a rule for a new trial; upon which the defendant, who had defended generally, and was adviſed that he ſhould thereby be liable for the whole coſts, applied to a judge at chambers for an order upon the plaintiff to ſpecify the particulars for which his declaration was ſerved; and accordingly in *February* 28 1795 Mr. Juſtice *Groſe* made an order that the plaintiff ſhould ſpecify the particulars within four days, and that the defendant within four days after that ſhould ſpecify the particulars for which he defended.

rule to defend; which is nugatory if he really were not in poſſeſſion or claimed title. Then if the leſſor of the plaintiff is not bound to prove the defendant in poſſeſſion, it muſt be either becauſe the defendant has admitted it, or becauſe it forms no part of the matter to be tried, which is the title; in either caſe it will follow that the defendant ſhould not be allowed to diſpute his poſſeſſion.

Newbolt contrà was ſtopped by the Court.

Lord KENYON, Ch. J. This has certainly been vexata queſtio; when I went the circuit as counſel, the caſe in *Buller's Ni. Pri.*, in which it was ſaid "If there be but one defendant as tenant in poſſeſſion, the plaintiff need not prove him in poſſeſſion," was ſuppoſed to be law; and when a caſe afterwards came on before me on the Home Circuit I ruled accordingly, not thinking it neceſſary to prove the defendant in poſſeſſion. But I was never called on to conſider the queſtion accurately till now; and when we conſider the reaſon of the thing, it ſeems wonderful that any queſtion could ſeriouſly have ariſen upon this ſubject. On the trial of an ejectment two parties come to litigate the title to an eſtate, the perſon claiming, and the perſon who is ſuppoſed to withhold improperly, the poſſeſſion: but as ſoon it turns out that the latter is not in poſſeſſion, it ſeems to me that the cauſe is ill conſtituted between thoſe two perſons. The proceedings in ejectment were inſtituted in order to try who is entitled to the poſſeſſion of an eſtate on title: when the declaration is delivered the leſſor of the plaintiff claims in general terms ſo many acres of land, ſo many meſſuages, &c., which communicates but little intelligence to the perſon ſerved with the declaration. If the latter happen to be in poſſeſſion of any land falling within the deſcription in the declaration, he muſt defend in order to preſerve his own right; then it would be unjuſt that a verdict ſhould be found againſt him though he can prove a title to every acre of land in the pariſh of which he was ever in poſſeſſion; and yet this is the conſequence of the plaintiff's argument. Two rules have been made by the two Courts, differing indeed in words, and as the plaintiff now contends differing alſo in ſubſtance. In the Common Pleas the defendant enters into the conſent rule as to all the lands *in his poſſeſſion:* then on that rule it is neceſſary for the plaintiff to prove the defendant in poſſeſſion of the land that he claims. But it is ſaid that the meaning of the rule of this court is different: I ſhould be extremely ſorry to find that

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that in a fictitious proceeding, inſtituted for the more eaſy attaining of juſtice, different rules were to obtain in the different courts. If we were bound to decide in this caſe in favor of the plaintiff, it would be neceſſary to alter the rule of our court immediately. This point however came under the conſideration of the Court in the caſe reported in *Wilſon*, where it was holden that the plaintiff muſt prove the defendant in poſſeſſion; and I think that that caſe was properly decided. Then it was urged that two caſes have been ſince determined at Niſi Prius the other way: but they were only deciſions at Niſi Prius, where perhaps the ſubject was not ſo well conſidered, and they cannot outweigh the authority of the caſe in *Wilſon*. Therefore on the convenience and reaſon of the thing, and conſidering the queſtion in every point of view, I am of opinion that the plaintiff muſt prove the defendant in poſſeſſion of that which he ſeeks to take from him, and that the contrary practice that has obtained is wrong.

ASHHURST, J. This is a point of ſuch daily occurrence that it ought to be finally ſettled; and nothing can be more deciſive than the caſe in *Wilſon*, where it was determined that the plaintiff muſt prove the defendant in poſſeſſion of the land to which he claims title. If the defendant have any land in the pariſh mentioned in the declaration in ejectment, he may ſuppoſe when he is ſerved with the ejectment that the plaintiff intends to proceed for that; and if it turn out that the plaintiff ſues for other lands it is hard that he ſhould be aſwerable for the coſts of the ejectment when he is not in fault.

GROSE, J. The queſtion in this caſe is whether we are not to underſtand the rule of this court to be ſubſtantially the ſame as that made in the Common Pleas, though they differ in words. It is admitted that according to the rule of the Common Pleas the plaintiff is bound to prove the defendant in poſſeſſion: then it would be extraordinary that in a fictitious proceeding, invented for the purpoſe of trying titles, there ſhould be different rules in the different courts. But I think that the rules of both the courts are in ſubſtance the ſame; and the rule made in 1663 ſatisfies me that that rule was the rule of this court formerly; by that rule the defendant confeſſes leaſe entry and ouſter of ſuch premiſes as are in his poſſeſſion; and when I went the Weſtern Circuit the practice was for the plaintiff to prove the defendant in poſſeſſion of the premiſes that he claims. Nor is there any hardſhip in requiring proof of that which the plaintiff is ſuppoſed to have already

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already ſworn; for he ſwears that he has ſerved the declaration on the tenant of the premiſes in poſſeſſion. I therefore think that the meaning of the rules in both the courts is the ſame, and the deciſion in *Wilſon* fortifies me in that opinion.

Lawrence, J. It is highly convenient that the practice in both the courts on this ſubject ſhould be the ſame. The rule of this court is indeed inaccurately drawn; the defendant confeſſes leaſe entry and ouſter, without ſaying of what, and that leaves it open to us to put the ſame conſtruction on our rule as on that in the Common Pleas. The declaration in ejectment deſcribes nothing with certainty; the defendant is called upon to defend generally; he knowing that he has ſome premiſes anſwering to that general deſcription defends and enters into the common conſent rule, but at the trial he is turned round and is told that the plaintiff ſeeks to recover ſomething not in his poſſeſſion, and yet according to the plaintiff's argument he is to pay the coſts of the ejectment: but that is ſurely not conſiſtent with juſtice. Then this caſe was compared to the caſe of liberum tenementum: but as far as that applies, it is againſt the plaintiff; for, notwithſtanding the caſe in *Dyer*, according to the modern practice if the defendant plead liberum tenementum the plaintiff is driven to a new aſſignment in which he muſt ſpecify the cloſe, otherwiſe if the defendant prove his title to any land falling within the general deſcription mentioned in the declaration it is ſufficient; therefore by analogy to the caſe in treſpaſs the verdict ought to be for the defendant.

Per Curiam, Judgment of nonſuit.

Bowles *againſt* Fuller.

Friday, June 23d.

The Court will not permit a defendant to pay money into court in an action againſt the ſheriff for a falſe return to a fi. fa.

This was an action againſt the defendant, ſheriff of *Suſſex*, for a falſe return to a writ of fieri facias. The firſt count ſtated that the defendant had levied 21*l.* &c. but that he had falſely returned nulla bona; in the ſecond count it was alleged that the ſheriff did not levy on the goods of the party againſt whom the writ iſſued, though he might have levied, but falſely returned nulla bona.

A rule having been obtained on a former day calling on the plaintiff to ſhew cauſe why the proceedings ſhould not be ſtayed on paying 21*l.* and the coſts,

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Wood now ſhewed cauſe. This application is wholly unprecedented and without foundation; it is an attempt to try the cauſe on affidavits in a caſe where the damages are uncertain. But even if the Court were inclined to interfere at all, this is not the mode in which the defendant ſhould have applied; the application ſhould have been to pay money into court.

Park, *contrà*, admitted that the rule could not be ſupported in it's preſent form, but deſired that it might be corrected, and that the defendant ſhould have leave to pay 21*l.* into court, ſo as to let the plaintiff proceed at his peril. And he obſerved that ſuch an application was not more unreaſonable than a motion to pay money into court in trover for articles of a ſpecific value, which had in ſeveral inſtances been made with ſucceſs. But

The Court ſaid that even if the application had been only to pay money into court, it would be extending the rule farther than it had ever yet been carried; and they

Diſcharged the rule (*a*).

(*a*) Vid. *Pickering* v. *Truſte*, *ante* 53.

PATER *againſt* CROOME.

Friday, June 23d.

The 29th of *May* is not a holyday in any of the law-offices, and conſequently no officer can take an extraordinary fee for buſineſs done on that day.

Hughes obtained a rule on a former day, calling on the defendant, the ſealer of the writs, to ſhew cauſe why he ſhould not return to the plaintiff 10*s.* which he had taken for ſealing a writ of inquiry on the 29th of *May*, and which he had claimed as an extraordinary fee, beſides the uſual fee of 7*d.*, on the ground that it was a holyday. The application to the defendant to ſeal the writ was within the regular office hours between eleven and one o'clock. And this motion was founded on the caſe of *Sparrow* v. *Cooper*, 2 *Bl. Rep.* 1314 (*a*), where it was ſaid that the only allowed holydays are *Candlemas*, *The Aſcenſion*, and *St. John the Baptiſt*.

Mingay, who now ſhewed cauſe againſt the rule, produced an affidavit to ſhew that it had for many years been cuſtomary to keep this as a holyday in this office. But

The Court were of opinion, on the authority of the caſe referred to, that the extraordinary fee ought not to have been taken; and therefore they made the

Rule abſolute.

(*a*) See alſo *Figgins* v. *Willie*, 2 *Bl. Rep.* 1186.

BATCHELOR *againſt* ELLIS.

Friday, June 23d.

The defendant in the original action need not obtain a judge's order to change his attorney upon bringing a writ of error.

Garrow ſhewed cauſe againſt a rule for ſtaying the proceedings pending a writ of error; and objected to the defendant's right to proſecute ſuch rule, he having changed his attorney upon bringing the writ of error, without a judge's order for that purpoſe (*a*).

Marryat in ſupport of the rule ſaid that it was not neceſſary to obtain a judge's order in this caſe, becauſe a writ of error was the commencement of a new action, the writ being returnable in a different court; in the ſame manner as a ſcire facias to revive a former judgment has been holden to be a new action in a variety of caſes. And

The Court, being of opinion that there was no irregularity in this reſpect, and it not appearing that the writ of error had been brought for delay, made

The rule abſolute.

(*a*) *Vid.* The rule of court, *Mich.* 1654.

LUMLEY qui tam *againſt* FITZ.

Monday, June 26th.

The *Engliſh* notice to appear muſt be added to all common proceſs where the defendant is not held to bail, whether the cauſe of action do or do not amount to 10*l.*

THIS was a qui tam action for a penalty of 500*l.*, but it did not appear on any of the affidavits for what offence or on what act of parliament it was brought. The bill of *Middleſex* was returnable on *Friday* next after the Morrow of the Holy Trinity, and the notice at the bottom of the writ was to appear at the return of the writ being the 16th of *July*, inſtead of *June*; on account of this miſtake a rule was obtained calling on the plaintiff to ſhew cauſe why the bill of *Middleſex* ſhould not be ſet aſide for irregularity.

Barrow, who now ſhewed cauſe, relied on the caſe of *Willis* v. *Lewis* (*a*), where it was ſaid "reſolved by the Court that there is no occaſion to put the notice to appear at the bottom of the proceſs, according to the ſtatute of *Geo.* 2., *this being above* 10*l.*"

Marryat in ſupport of the rule. The caſe in *Wilſon* cannot be ſupported. By ſtat. 12 *Geo.* 1. *c.* 29. *ſ.* 1. it is enacted that where the cauſe of action does not amount to 10*l.* the defendant ſhall

(*a*) 1 *Wilſ.* 22.

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not be arreſted, but ſhall be ſerved with a copy of the proceſs: the ſecond ſection directs an affidavit of the debt to be made where the cauſe of action amounts to 10*l.*, and an indorſement of the ſum ſworn to to be made on the back on the writ or proceſs; adding, "but if any writ or proceſs ſhall iſſue for the ſum of 10*l.* or upwards, and no affidavit and indorſement be made as aforeſaid, the plaintiff ſhall not arreſt the defendant, but ſhall proceed in like manner as is by this act directed in caſes where the cauſe of action does not amount to the ſum of 10*l.*" And the ſtat. 5 *Geo.* 2. *c.* 27. enacts that the proceſs &c. ſhall be in the *Engliſh* language; and ſect. 4. directs that upon every copy of ſuch proceſs to be ſerved &c. ſhall be written an Engliſh notice to appear &c. Then no affidavit to hold to bail having been made in this caſe, it was neceſſary to add the notice at the bottom of the writ. But even if it were not neceſſary to give any *Engliſh* notice becauſe the cauſe of action amounts to 10*l.*, the plaintiff undertook to give notice in this caſe and miſled the defendant by a wrong notice; ſo that at all events this caſe is diſtinguiſhable from that in *Wilſon.*

Lord Kenyon, Ch. J. The concluding ſentence in the ſecond ſection of the ſtatute 12 *Geo.* 1. *c.* 29. makes this point extremely clear; it ſays that if any writ ſhall iſſue for the ſum of 10*l.* and there be no affidavit to hold to bail, *the plaintiff ſhall proceed in like manner as is by the act directed in caſes where the cauſe of action does not amount to* 10*l.* Probably that clauſe was not adverted to when the caſe in *Wilſon* was decided.

Per Curiam, Rule abſolute.

Tueſday, June 27th.

Lees *againſt* Smith.

A company of ſhip-owners engaged to inſure each other's ſhips, and covenanted *ſeverally*, and not jointly, to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, but in caſe of the inſolvency of any one of the members all the others were to be reſponſible: ruled that this contract was void by the ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 12.

THIS was an action of covenant. The declaration ſtated that by certain articles of agreement, dated the 11th of *April* 1787, between the defendant and certain other perſons therein named and deſcribed as ſeveral owners and part-owners of ſhips and the ſeveral other perſons owners or part-owners of ſhips who ſhould then or at any time thereafter be admitted and become parties to the ſaid articles &c of the firſt part and the plaintiff of the other part, it was covenanted and agreed, and the ſaid ſeveral

parties

parties to thoſe preſents for themſelves *ſeverally* and not jointly (amongſt other things) covenanted with the plaintiff that they would ſeverally engage and bind themſelves for the aſſurance of ſhips and parts of ſhips belonging to the ſeveral and reſpective parties of the firſt part along with his or their own ſeveral and reſpective parts of any ſhips from the 1ſt of *June* then next for twenty-one years, ſubject to certain conditions and regulations &c; that in caſe of a total loſs of any ſuch ſhip the ſeveral parties to the ſaid articles of agreement of the firſt part *ſeverally* covenanted to pay his or their proportionable part or ſhare of the ſum of 1000*l.* to the perſon who ſhould have entered and enſured ſuch ſhip. It then ſtated that *W. Wealands*, who was intereſted in a ſhip called *The Wealands* to the value of 1200*l.*, became a party to and ſealed &c. the articles of agreement and entered the ſaid ſhip for inſurance; that that ſhip was on the 1ſt of *June* 1795 taken as prize; and that the defendant, though requeſted, refuſed to pay to *Wealands* his proportionable part of the ſaid ſum of 1000*l.*, to wit 100*l.*, according to the meaning and effect of the ſaid agreement.

The defendant craved oyer of the articles, in which it was ſtated that the ſeveral parties had agreed to become a company or ſociety for the aſſurance of ſhips &c under certain regulations &c; one of which was as follows; "that in caſe any member of the company ſhould become inſolvent or unable to pay a proportionable part of any loſs that might happen, the proportionable part or ſhare of ſuch inſolvent member ſhould be made by the other members of the company; and all coſts charges and expences which might be occaſioned by reaſon of any action brought or defended by order of the committee ſhould be borne and paid equally by the reſpective members of the company." The defendant then pleaded that after the ſtat. 6 *Geo.* 1. *c.* 18. "for better ſecuring certain powers and privileges intended to be granted by his majeſty by two charters for aſſurance of ſhips and merchandizes at ſea &c." his ſaid late majeſty on the 22d of *June* in that year incorporated the two companies, The Royal Exchange Aſſurance Company and The *London* Aſſurance Company; that afterwards the ſaid articles of agreement in the declaration mentioned were made and executed by the defendant, and that when the ſame were ſo made the ſaid corporations were continuing; by reaſon whereof the ſaid articles are void in law.

To this plea there was a general demurrer.

Dickins in ſupport of the demurrer. This queſtion depends on the meaning of the ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 12. (*a*), and the articles of agreement ſet forth in the pleadings. The object of the Legiſlature in paſſing that ſtatute was to confer certain privileges on the two great companies therein mentioned, and to prevent any competition between them and any other companies or ſocieties engaged in a *joint ſcheme:* but it expreſsly provides that any private perſons may underwrite as fully and beneficially as if the act had never been made. Now in this caſe the individual members of the company ſpecifically engage only to anſwer for themſelves *ſeverally* and not jointly; and therefore this does not come within the prohibitory part of the act, which is confined to a joint capital, embarked on a joint reſponſibility. This caſe is diſtinguiſhable from thoſe of *Sullivan* v. *Greaves* (*b*), and *Michell* v. *Cockburn* (*c*); the firſt was decided to be a caſe within the ſtatute on the ground that though there was no general partnerſhip there was a partnerſhip in the particular tranſaction and a joint reſponſibility. And in the other caſe it was a joint, though a ſecret, undertaking between *A.* and *B.*, and as the capital of each was reſponſible for the whole, the Court ſaid it came within the miſchief of the act of parliament. But thoſe caſes cannot apply to the preſent, where the parties have covenanted in expreſs terms that they will only *ſeverally* pay a proportionable part of the loſs. And there is a ſubſequent caſe, *Harriſon* v. *Millar* (*d*), on the authority of which this caſe may be

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(*a*) The ſtat. 6 *Geo.* 1. *c.* 18. *ſ.* 1. enables the king to grant charters to the two bodies then about to be incorporated; and ſect. 12. prohibits any other corporations aſſuring ſhips &c. and enacts that all ſuch contracts of aſſurance ſhall be ipſo facto void; providing that any private or particular perſon or perſons may underwrite &c. as fully and beneficially as if the act had never been made, "ſo as the ſame be not upon the account or riſk of a corporation, or upon the account or riſk of perſons acting in a ſociety or partnerſhip for that purpoſe."

(*b*) Sittings after *E.* 29 *Geo.* 3. *Park's Inſur.* 8.

(*c*) 2 *H. Bl. Rep.* 379.

(*d*) Sittings after *M* 1796, coram Lord *Kenyon*, Ch. J. at Guildhall; which was thus ſtated at the bar.—It was an action on two policies of inſurance effected on the *Ann* and *Elizabeth* from *Dantzic* to *London*. The plaintiff and the defendant were members of "The *Whitby* Aſſociation," conſiſting of a number of perſons owners of ſhips, each of whom in proportion to his ſhipping paid a certain ſum which formed the ſtock of the ſociety. The policies were ſigned by all the members. All inſured for each other according to the reſpective values of their ſhips, and when any loſs happened, the treaſurer paid it out of the joint ſtock. The defendant's ſhare was 14*l.* Each individual was only liable for the ſum he had undertaken. *Erſkine* for the defendant objected that the policies were void in law: but Lord *Kenyon* over-ruled the objection; His Lordſhip ſaid "this does not infringe on the act of parliament, as the members of this aſſociation have only underwritten in their individual characters: but they cannot underwrite for themſelves and partners. If all of them were liable up to the extent of their be determined in favor of the plaintiff. If the article ſet out in this plea be relied on by the defendant to ſhew that this is a joint undertaking, it would be ſufficient to anſwer that this action is not founded on that clauſe; and a deed may be good in part and bad in part, *Touchſt.* 68; 11 *Co.* 27. *a.* So that if that clauſe be illegal as being againſt the policy of the ſtatute, it being a ſeparate and independent clauſe may be rejected.

Chambre, *contrà*, was ſtopped by the Court.

Lord KENYON, Ch. J. It is ſaid that if this caſe depended entirely on the parts of the deed ſet forth in the declaration, the plaintiff would have been entitled to judgment: but we cannot poſſibly get rid of the other part of the deed diſcloſed in the plea which forms an eſſential ingredient in the contract on which the action is brought. This is not like the caſe of independent covenants, where one may be ſtruck out; for this is of the very eſſence of the contract. The meaning of the Legiſlature in paſſing the act alluded to was that, as the two great inſurance companies were to have a monopoly up to a certain extent in conſideration of certain ſums of money paid by them to the public, there ſhould be no competition between them and any other public body; but that private individuals might ſtill continue to inſure on their own account. The caſe of *Harriſon* v. *Millar* ſeems to have been properly decided; there each perſon undertook for himſelf only according to the value of his own ſhare: but here in caſe of the inſolvency of any one of the members all the others are liable to make good his ſhare of the loſs. This is adding the credit of the reſt of the members of the ſociety, which is the very thing that the act of parliament intended to prevent, namely that in no event ſhould the joint credit of any company be pledged in a contract of inſurance. Therefore I am of opinion that the plaintiff cannot recover.

ASHHURST, J. In order to induce the two great companies to pay certain ſums to the public, it was thought proper to confer particular privileges on them, one of which was that no other company or body of men ſhould be permitted to inſure in oppoſition to them. Then the only queſtion is whether by one of the articles of partnerſhip this company does not fall within the

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their whole ſtock, it would be illegal. At preſent the members of this aſſociation only ſtand as individual underwriters for ſmall ſums." And the cauſe was at laſt referred, to inquire whether the money paid into court was ſufficient to cover the loſs.

prohibitory

prohibitory part of this act of parliament; I think it does becauſe in one event they are jointly reſponſible.

GROSE, J. The twelfth ſection in this ſtatute points out thoſe who may and thoſe who may not inſure; and I think that this ſociety clearly comes within the latter deſcription.

LAWRENCE, J. By the article ſet out on the oyer of the deed it appears that a joint credit is given in one event; and whenever that is the caſe, it falls within the prohibitory part of the ſtatute.

Judgment for the defendant.

Tueſday, June 27th.

See vol. 2. p. 210. of my Case in various opinions in this very case.

VENABLES and ELIZABETH his Wife *againſt* R. MORRIS and EDWARDS.

The LORD CHANCELLOR ſent the following Caſe for the Opinion of the Judges of this Court.

BY indenture dated 15th *Auguſt* 1767, and made between *S. Morris* and *Hannah* his wife of the one part, and *R. Lloyd* and *R. Edwards* of the other part, after reciting articles of agreement made prior to and in contemplation of the marriage then lately had between *S. Morris* and *H.* his wife of certain lands and hereditaments, the eſtate and inheritance of the wife, and that it was agreed that in purſuance of the articles a ſettlement ſhould be made of the ſaid hereditaments and premiſes after the death of the wife's mother in reverſion, as therein mentioned, it was witneſſed that in purſuance of the articles and agreement *S. Morris* covenanted with *Lloyd* and *Edwards* their heirs and aſſigns that he (*S. M.*) and his wife would at or before the end of the next great ſeſſions for the county of *Montgomery* acknowledge a fine ſur conuſance de droit come ceo &c. to *Lloyd* and *Edwards* and their heirs of the ſeveral undivided parts of land therein mentioned (being the lands in queſtion); and it was thereby agreed that the fine ſhould enure to the uſe of *S. Morris* for life without impeachment of waſte, remainder to the uſe of ſaid *Lloyd* and *Edwards* and their heirs for the life of *S. Morris* in truſt to ſupport contingent remainders, remainder to the uſe of *Hannah Morris* for life without impeachment of waſte, remainder to the uſe of *Lloyd* and *Edwards* and their heirs generally in fee in truſt to ſupport

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ſupport the contingent uſes and eſtates thereof thereinafter limited from being defeated or deſtroyed, and for that purpoſe to make entries and bring actions as occaſion ſhould require, but nevertheleſs to permit *Hannah* and her aſſigns to receive the rents &c.; and after the ſeveral deceaſes of *S. Morris* and his wife to the uſe of the firſt and other ſons of the marriage ſeverally and ſucceſſively in tail, remainder to the uſe of the firſt and other daughters ſucceſſively in tail, remainder to the uſe of the ſaid *Hannah* and the heirs of her body lawfully iſſuing; and for default of ſuch iſſue to the uſe of ſuch perſon or perſons and to and for ſuch uſes eſtates intents and purpoſes as *Hannah* ſhould at any time thereafter notwithſtanding her coverture by any deed or deeds or by will duly executed limit or appoint; and in default of ſuch limitation or appointment, to the uſe of the right heirs of *Hannah* for ever. A fine was accordingly levied by *S. Morris* and his wife. *Hannah Morris* by a deed-poll bearing date 2d *September* 1767 properly executed, reciting the indenture of the 15th *Auguſt* 1767 and the fine ſo levied, and that ſhe was deſirous to limit the reverſion of the ſaid hereditaments and premiſes in default of any iſſue of her body, did by virtue of the ſaid power veſted in her limit and appoint all and ſingular the ſaid premiſes in default of any iſſue of her body begotten or to be begotten (ſubject nevertheleſs as is thereinbefore mentioned) to the uſe of ſuch perſon or perſons and to and for ſuch uſes intents and purpoſes as ſhe ſhould at any time thereafter by her laſt will in writing duly executed direct limit and appoint; and for want of ſuch direction &c, to the uſe of the right heirs of *S. Morris* for ever. *Hannah Morris* died in *November* 1770, without leaving any child or iſſue, and without having made any will or other appointment, ſave as before-mentioned, and leaving the plaintiff *Elizabeth Venables* her ſiſter and heir at law. *S. Morris* died in *February* 1793 inteſtate, leaving the defendant *R. Morris* his brother and heir at law.

The queſtions ſubmitted to this Court were; 1ſt, Whether, upon the death of *S. Morris*, *R. Morris* became entitled to any and what intereſt in the premiſes in queſtion? 2d, Whether, upon the death of *S. Morris*, *Elizabeth Venables* became entitled to any and what intereſt in the premiſes in queſtion?

Barrow for the plaintiff contended that the plaintiff *Elizabeth Venables* as the heir at law of *Hannah Morris* was entitled; and that the appointment executed by the latter under the power reſerved to her was invalid. Firſt, the limitation to the heirs of *S. Morris*

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S. Morris under the deed of appointment, as unconnected with his eſtate for life under the ſettlement of *Auguſt* 1767 and the ſubſequent fine, is " on default of any iſſue of the body of *Hannah Morris* begotten or to be begotten;" which tends to a perpetuity, and is therefore too remote; being in effect to give a veſted intereſt after an indefinite failure of iſſue. *Swain* v. *Deakin*, *Dom. Proc.* 1728, cited in *Jones* v. *Morgan*, 7 *Bro. P. C.* 162. Lady *Laneſborough* v. *Fox*, *Caſ. temp. Talbot* 262. 4 *Bro. P. C.* 96. S. C. *Moor* v. *Parker*, 4 *Mod.* 316. 1 Ld. *Raym.* 37. *Goodman* v. *Goodright*, 2 *Burr.* 873. and note to *Doe* v. *Fonnereau*, *Dougl.* 508. 3d edit. 1 *Blac. Rep.* 188. S. C. *Goodright* v. *Corniſh*, *Salk.* 226. 1 Ld. *Ray.* 3. and 4 *Mod.* 256. S. C. (*a*); which three laſt-mentioned caſes alſo ſhew that the eſtate of *S. Morris* cannot be enlarged by the ſubſequent limitation to his heirs againſt the expreſs words of the party limiting the ſame. Secondly, the limitation to the heirs of *S. Morris* after failure of *H. Morris*'s iſſue, unconnected with the eſtate before granted to him by the former deed, is void, there being no precedent eſtate to ſupport it. [Lord *Kenyon* mentioned the caſe of *Harris* v. *Barnes*, 4 *Burr.* 2157. where this ſort of queſtion was much conſidered; and where it was holden that a deviſe to the heirs of a man's body might take effect as an executory deviſe, and the freehold in the mean time deſcend to the heir at law.] Admitting that the ſame limitation which would operate as an executory deviſe in a will, may in general take effect as a ſpringing uſe in the conſtruction of a deed, ſtill it muſt depend on the preceding eſtates created; and a ſeparate grant of an eſtate to a man's *heirs* in his lifetime cannot take effect, according to the rule nemo eſt hæres viventis. At any rate ſuch a limitation after an indefinite failure of iſſue (*b*) would be too remote to operate either as an executory deviſe or as a ſpringing uſe. Thirdly, The limitation to *S. Morris* by the ſettlement, and the limitation to his heirs by the appointment, cannot unite, according to the rule in *Shelley*'s caſe, 1 *Co.* 93. *b.* 104. *a.* 106. *b.* 1ſt, Becauſe they are in ſeparate inſtruments. *Moor* v. *Parker*, 4 *Mod.* 316. 1 Ld. *Ray.* 37. *Doe* v. *Fonnereau*, *Dougl.* 508. *Habergham* v. *Vincent*, 5 *Term Rep.* 92. 2dly, Becauſe the limitation to the heirs was to take effect, if at all, by way of ſpringing uſe, and not as a remainder after the determination of a

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(*a*) Vid. *Habergham* v. *Vincent*, *ante*, 5 vol. 92.

(*b*) Vid. *Doe* v. *Fonnereau*, *Dougl.* 508.

precedent

precedent eſtate; *Lloyd* v. *Carew*, *Prec. in Chan.* 72. *Show. C. P.* 137. 1 *Fearne's Cont. Rem.* 415, 416. 3dly, Becauſe the rule in *Shelley*'s caſe is contrary to the intent, and being founded merely on the ſyſtem of feudal tenures is applicable to thoſe caſes only in which an inheritable quality is to be communicated to the eſtate for life firſt given, when the diſpoſing party does in one and the ſame tranſaction look to the anceſtor as the ſtock from whence the *heirs* are to proceed. 4thly, Becauſe the eſtate to *S. Morris* for life was a *legal* eſtate, and the appointment to his heirs conveyed only an *equitable* eſtate, inaſmuch as the intervening limitation to truſtees and their heirs after the life-eſtate to *Hannah Morris* is a ſubſiſting eſtate in fee in thoſe truſtees; and therefore all the ſubſequent uſes are uſes upon uſes, and truſts, not executed by the ſtatute. And it is ſettled that the rule in *Shelley*'s caſe does not extend to unite eſtates of different qualities, as in this caſe an equitable limitation to the heirs with a legal eſtate for life in the anceſtor. Lady *Jones* v. Lord *Say* & *Seal*, 3 *Bro. P. C.* 458. 8 *Vin. Abr.* 262. *Tippin* v. *Coſin*, 1 Ld. *Raym.* 33.

Benyon, for the defendants, contended that on the death of *S. Morris* the defendant *R. Morris* who was his heir at law became entitled to the premiſes in fee under the appointment of *H. Morris*, either by deſcent, if according to the rule in *Shelley*'s caſe the eſtate limited under the execution of the power to the heirs of *S. Morris* could unite with and enlarge the precedent eſtate for life which he took by the ſettlement, or by purchaſe, if no ſuch union could take place, conſidering the words "heirs of *S. Morris*" as a deſignation of the perſon who was to take after all the preceding eſtates were expended. The two firſt objections depend on the third; for if the limitation under the power of appointment can unite with the antecedent eſtates carved out of the inheritance by the deed of *Auguſt* 1767 and the ſubſequent fine, the two firſt objections will fall to the ground together with the third. Now it is a general rule that an appointment in purſuance of a power created by a former deed, when executed, it to be taken as if it were inſerted in the original deed, and is ſupplementary to it. Sir *Edward Clere*'s caſe, 6 *Co.* 18(*a*); in which caſe the appointment of the ultimate remainder to the heirs of *S. Morris* by the deed-poll of the 2d *September* 1767 muſt have the ſame conſtruction

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(*a*) Vid. *Robinſon* v. *Hardcaſtle, ante*, 2 vol. 241. and *Doe* v. *Whitehead*, 2 *Burr.* 710.

VENABLES *againſt* MORRIS.

as if the limitation had been inſerted in the antecedent deed; and then according to *Shelley*'s caſe this would operate to give an eſtate in fee to *S. Morris*, from whom the defendant *R. Morris* would then claim by deſcent. But then it is objected that the limitation to the heirs, being in default of iſſue of *H. Morris* indefinitely, is too remote to take effect. But that has no foundation; for it appears that eſtates tail were before limited ſucceſſively to all the iſſue both ſons and daughters of *H. Morris*, and therefore the ultimate remainder could never veſt in poſſeſſion ſo long as any of her deſcendants were living. The words therefore "in default of any iſſue of her body" are tautologous and ſuperfluous, and mean no more than what was before expreſsly declared; and the limitations will in ſubſtance ſtand thus; an eſtate for life is given to the huſband, remainder to the wife for life, remainder to their firſt and other ſons ſucceſſively in tail, remainder in like manner to their daughters, remainder to the wife in tail, remainder to the heirs of the huſband; which amounts to no more than the common caſe of a remainder over after an eſtate-tail. The diſtinction was expreſsly taken in *Badger* v. *Lloyd*, 1 Ld. *Ray*. 523. 1 *Salk*. 232. S. C., where the Court agreed that if a man ſeiſed in fee deviſe lands to *A.*, if *J. S. a ſtranger* die without iſſue, this is too remote to take effect; becauſe by theſe means the eſtate may be tied up for a longer period than the law allows; for ſo long as *J. S.* had iſſue the eſtate would be unalienable: but according to the ſame caſe, if a man ſeiſed of a reverſion after an eſtate-tail deviſe the lands to another after failure of iſſue of the tenant in tail, it is an immediate deviſe of the reverſion expectant on the determination of the eſtate-tail, and therefore good; for there the ſame reaſon does not hold. It muſt be admitted that at common law a ſimple grant to *the heirs of a perſon living* is void; but ſuch a limitation may under circumſtances be good, either as an executory deviſe, or as a ſpringing uſe. Here the remainder was not created by the deed of appointment, but exiſted before under the ſettlement; and the deed of appointment only deſignated the perſon who was to take after the failure of all the preceding eſtates, and conſequently after the death of *S. Morris* at which time it muſt be certain who was his heir. In *Cro. Car.* 102. a remainder to the ſurvivor of two perſons was holden good, though during their joint lives it could not be aſcertained which of them would take. If therefore the

the rule in *Shelley*'s caſe apply to this, *R. Morris* will take by deſcent; if not, he will take as a purchaſer under the deſcription of *heir* of *S. Morris* after his death. But then it is objected that this being an equitable remainder, it cannot unite with an antecedent legal eſtate for life. Suppoſing that to be ſo, and that this Court could not regard the truſt, the only effect would be to ſend this caſe back to the court of Chancery to be new-modelled. But this is not an equitable remainder; for the Court will look to the intention of the parties to the deed of *Auguſt* 1767; and they will ſee that the intention of interpoſing the eſtate to the truſtees after the eſtate for life to *H. Morris* was merely to preſerve contingent remainders *during her life*; and therefore they will ſo conſtrue the limitation to the truſtees as if thoſe words were added. As in *Coriton* v. *Hellier* cited in 2 *Vez.* 195. (*a*); where the Lord Chancellor on the deviſe of a term of ninety-nine years ſupplied the words "if he ſo long live," in order to effectuate the intent.

See 1 Bro. Cha. Cas. 72. in Bootle v. Allington

Lord KENYON, Ch. J. I ſhould find ſome difficulty in deciding that the ſubſequent limitations are eſtates executed. In the caſe cited by the defendant's counſel, Lord *Hardwicke* ſupplied the words from neceſſity, but that is not like this caſe: however I wiſh to anſwer the caſe ſent to us from the Lord Chancellor, without noticing this point.

Several topics have been ſtated at the bar, of which no doubt can now be entertained. Ever ſince the caſe of *Jones* v. Lord *Say* & *Seal* (*b*) it has been conſidered, and perhaps there was no doubt of it before, that a legal eſtate in the anceſtor and an equitable eſtate to the iſſue could not be united ſo as to increaſe the eſtate in the anceſtor. But the preſent caſe is different from all thoſe that have been cited: that which comes neareſt to the preſent is the caſe of *Haberghamv.* *Vincent*; but that is diſtinguiſhable from this; for there the will was wholly ineffective at firſt, the power created by the will could not operate at all at the time when it was made. But the defendants' counſel has accurately ſtated the ground on which this caſe ought to be decided, namely, that an appointment when executed is to be conſidered in the ſame light as if it had been inſerted in the original deed by which the power of appointment was created. Then let us ſee what would have been the caſe here if this appointment had been inſerted in the deed creating the power. An eſtate was limited to *S. Morris* for life, and after

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(*a*) Vid. *Fearne's Cont. Rem.* 495. laſt edition.

(*b*) 1 *Eq. Caſ. Abr.* 383. *pl.* 4. 3 *Bro. P. C.* 458.

ſeveral intermediate limitations an eſtate was limited to his heirs for ever; and whether the laſt be a legal or an equitable eſtate makes no other difference than this, that in the one caſe the heir will take as a purchaſer in the other by deſcent: but quâcunque viâ datâ the defendant is entitled in this caſe. For if the limitation to the heir of *S. Morris* be a legal eſtate, it enlarged the eſtate in the anceſtor and gave him a fee; if it be an equitable remainder to which the prior legal eſtate in the anceſtor could not be united, it was a contingent remainder to the heir, and the heir takes as a purchaſer; and the prior eſtate in the truſtees if they took ſuch an eſtate or in the father would ſupport this remainder, and the inſtant the prior eſtate was determined this contingent remainder was ready to take effect. Therefore the heir of *S. Morris* is now entitled to take, and it is immaterial whether he takes as a purchaſer or by deſcent (*a*).

(*a*) The certificate was not ſent to the Lord Chancellor when this caſe was printed.
see the certificate post. 438.

Wedneſday, June 28th.

MITCHINSON *againſt* HEWSON.

The huſband cannot be ſued alone for the debt of his wife contracted before marriage.

IN aſſumpſit, the firſt count ſtated that the defendant was indebted to the plaintiff in 50*l.* for work and labour before the defendant's intermarriage with *Ann* his wife, and while the ſaid *Ann* was a widow, done and performed and for divers medicines found and provided by the plaintiff for her and for her three ſons by her former huſband at her ſpecial inſtance and requeſt, and being ſo indebted the defendant promiſed to pay &c. There was another count for work and labour &c for the defendant's wife before her marriage with the defendant. The defendant pleaded the general iſſue; and the plaintiff obtained a verdict for 10*l.* 18*s.*

Bayley moved in arreſt of judgment laſt term, becauſe the wife ought to have been joined with the huſband in the action, the cauſe of action being a debt of the wife's before the marriage. For which he cited *Robinſon* v. *Hardy* (*a*), and *Drue* v. *Thorn* (*b*).

Raine now ſhewed cauſe againſt a rule obtained for that purpoſe. The queſtion is whether the intermarriage between the defendant and his wife is not a good conſideration for the promiſe; for after verdict it may be preſumed that there was evidence of a promiſe in writing by the huſband to pay the debt. In *Hawkes* et Uxor v. *Saunders* (*c*) Lord *Mansfield* ſaid "where a man is

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(*a*) 1 *Keb.* 281. 440. (*b*) *All.* 72. (*c*) *Cowp.* 290.

under a legal or equitable obligation to pay, the law implies a promiſe, though none was ever actually made; à fortiori a legal or equitable duty is a ſufficient conſideration for an actual promiſe. Where a man is under a moral obligation which no court of law or equity can enforce, *and promiſes*, the honeſty and rectitude of the thing is a conſideration." Here no doubt the huſband is bound legally in conjunction with his wife; therefore he is under both a moral obligation and an equitable duty to pay her debt alone, which is ſufficient in law to ſuſtain a promiſe to pay it. In the caſe of a debt due to the wife before marriage the huſband alone may ſue for it; then it ſeems reaſonable that he may be ſued alone for her debts contracted before, if he promiſe to pay them. To ſhew that he may ſo ſue, he cited *Howell* v. *Maine* (*a*), 1 *Com. Dig*. 156. (E), 1 *Rol. Abr*. 32. *l*. 20. *Hilliard* et Uxor v. *Hambridge* (*b*), *Blackborn* et Uxor v. *Greaves* and others (*c*), *Oglander* v. *Baſton* (*d*), *Bond* v. *Simmons* (*e*), and *Garforth* v. *Bradley* (*f*). From all which it appears that the huſband has an option to ſue for a debt due to his wife either alone or in conjunction with her. When he ſues, alone the judgment when recovered enures to his ſeparate uſe, and the damages in caſe of his death go to his executor; for by ſuing alone he ſhews his diſagreement to the intereſt of his wife: but if he join her with himſelf in the action, the judgment would then ſurvive to the wife. There are many inſtances in the books where a promiſe to pay will ſuſtain an action although none would otherwiſe have been raiſed by implication of law; as in the caſe of an infant mentioned by Lord *Manſfield* in *Cowp*. 290, who may bind himſelf after he comes of age by a promiſe to pay money advanced to him before, though not for neceſſaries. As to the caſes cited from 1 *Keb*. 281. 440. and *All*. 72., the anſwer is that the queſtions there aroſe on ſpecial verdicts, where the finding of the jury might negative the promiſe laid in the declaration. That appears certainly to have been the caſe in the laſt-mentioned report, and probably was ſo in the other, though that is very ſhort and does not ſtate the finding in detail.

Bayley contrà. There is no conſideration in law to ſuſtain the promiſe laid in the declaration. Without ſuch a promiſe it is clear that the huſband would only be liable in caſe of a recovery

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(*a*) 3 *Lev*. 403.
(*b*) *All*. 36.
(*c*) 2 *Lev*. 107.
(*d*) 1 *Vern*. 396.
(*e*) 3 *Atk*. 21.
(*f*) 2 *Vez*. 676, 7.

againſt him during the joint lives of himſelf and his wife in an action againſt them jointly. If the wife died before the action was commenced he would not be liable; neither would his executors if he died in the lifetime of his wife before judgment; but the action would ſurvive againſt the wife in the latter caſe, and againſt her perſonal repreſentatives in the former. The effect of this action then is to increaſe the liability which the law throws on the huſband; for it is to make him liable though his wife died, and to make his perſonal repreſentative liable though he died in the lifetime of his wife before judgment; it is therefore nudum pactum, and the promiſe is void in law. He then cited *Rann* v. *Hughes* (*a*) to ſhew that the promiſe muſt be coextenſive with the con-

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(*a*) RANN and another Executors of MARY HUGHES *v.* ISABELLA HUGHES Adminiſtratrix of J. HUGHES in error; Dom. Proc. —The declaration ſtated that on the 11th of *June* 1764 divers diſputes had ariſen between the plaintiffs' teſtator and the defendant's inteſtate, which they referred to arbitration; that the arbitrator awarded that the defendant's inteſtate ſhould pay to the plaintiffs' teſtator 983*l.* That the defendant's inteſtate afterwards died poſſeſſed of effects ſufficient to pay that ſum; that adminiſtration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the ſaid ſum of 983*l.* was unpaid, "by reaſon of which premiſes the defendant as adminiſtratrix became liable to pay to the plaintiffs as executors the ſaid ſum, and being ſo liable ſhe in conſideration thereof undertook and promiſed to pay &c." The defendant pleaded non aſſumpſit; plenè adminiſtravit; and plenè adminiſtravit, except as to certain goods &c. which were not ſufficient to pay an outſtanding bond debt of the inteſtate's therein ſet forth &c. The replication took iſſue on all theſe pleas. Verdict for the plaintiff on the firſt iſſue, and for the defendant on the two laſt; and on the firſt a general judgment was entered in B. R. againſt the defendant de bonis propriis. This judgment was reverſed in the Exchequer-chamber; and a writ of error was afterwards brought in the Houſe of Lords, where after argument the following queſtion was propoſed to the Judges by the Lord Chancellor, "Whether ſufficient matter appeared upon the declaration to warrant after verdict the judgment againſt the defendant in error in her perſonal capacity:" upon which the Lord Chief Baron *Skynner* delivered the opinion of the Judges to this effect.—It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country ſupplies no means, nor affords any remedy, to compel the performance of an agreement made without ſufficient conſideration; ſuch agreement is nudum pactum ex quo non oritur actio; and whatſoever may be the ſenſe of this maxim in the civil law, it is in the laſt-mentioned ſenſe only that it is to be underſtood in our law. The declaration ſtates that the defendant being indebted as adminiſtratrix promiſed to pay when requeſted, and the judgment is againſt the defendant generally. The being indebted is of itſelf a ſufficient conſideration to ground a promiſe, but the promiſe muſt be coextenſive with the conſideration unleſs ſome particular conſideration of fact can be found here to warrant the extenſion of it againſt the defendant in her own capacity. If a perſon indebted in one right in conſideration of forbearance for a particular time promiſe to pay in another right, this convenience will be a ſufficient conſideration to warrant an action againſt him or her in the latter right: but here no ſufficient conſideration occurs to ſupport this demand againſt her in her perſonal capacity; for ſhe derives no advantage or convenience from the promiſe here made. For if I promiſe generally to pay upon requeſt what I was liable to pay upon requeſt in another right, I derive no advantage or convenience from this promiſe, and therefore there is not ſufficient conſideration for it. But it is ſaid that if this promiſe is in writing that takes away the neceſſity of a con-

conſideration. So here, the huſband is only liable to pay this debt in right of his wife in certain events; but this is an attempt to make him liable in his own right and at all events. As to the anſwer attempted to be given to the caſes in *Keble* and *Alleyn*, it cannot make any difference that the queſtion aroſe on ſpecial verdicts; and beſides, in the report in *Keble* reference is made to a caſe where the ſame point was determined on demurrer.

The Court thought that according to the beſt authorities on this ſubject the action againſt the huſband alone could not be ſupported; obſerving that the caſe cited from *Alleyn* was a direct authority in point. And therefore they made the

Rule abſolute.

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conſideration and obviates the objection of nudum pactum, for that cannot be where the promiſe is put in writing; and that after verdict, if it were neceſſary to ſupport the promiſe that it ſhould be in writing, it will after verdict be preſumed that it was in writing: and this laſt is certainly true; but that there cannot be nudum pactum in writing, whatever may be the rule of the civil law, there is certainly none ſuch in the law of *England*. His Lordſhip obſerved upon the doctine of nudum pactum delivered by Mr. J. *Wilmot* in the caſe of *Pillans* v. *Van Mierop* and *Hopkins*, 3 *Burr*. 1663, that he contradicted himſelf, and was alſo contradicted by *Vinnius* in his Comment on *Juſtinian*.

All contracts are by the laws of *England* diſtinguiſhed into agreements by ſpecialty, and agreements by parol; nor is there any ſuch third claſs as ſome of the counſel have endeavoured to maintain, as contracts in writing. If they be merely written and not ſpecialties, they are parol, and a conſideration muſt be proved. But it is ſaid that the ſtatute of Frauds has taken away the neceſſity of any conſideration in this caſe; the ſtatute of Frauds was made for the relief of perſonal repreſentatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordſhip here read thoſe ſections of that ſtatute which relate to the preſent ſubject. He obſerved that the words were merely negative, and that executors and adminiſtrators ſhould not be liable out of their own eſtates, unleſs the agreement upon which the action was brought or ſome memorandum thereof was in writing and ſigned by the party. But this does not prove that the agreement was ſtill not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converſe of the propoſition that when in writing the party muſt be at all events liable. He here obſerved upon the caſe of *Pillans* v. *Van Mierop* in *Burr*. and the caſe of *Loſh* v. *Williamſon*, *Mich*. 16 *G*. 3. in *B. R.*; and ſo far as theſe caſes went on the doctrine of nudum pactum, he ſeemed to intimate that they were erroneous. He ſaid that all his brothers concurred with him that in this caſe there was not a ſufficient conſideration to ſupport this demand as a perſonal demand againſt the defendant, and that its being now ſuppoſed to have been in writing makes no difference. The conſequence of which is that the queſtion put to us muſt be anſwered in the negative.

And the judgment in the Exchequer-chamber was affirmed.

1797.

Wedneſday, June 28th.

MANSELL *againſt* BURREDGE and ROBERTS.

Two ſeveral tenants of a farm agreed with the ſucceeding tenant to refer certain matters in difference reſpecting the farm to arbitration, and jointly and ſeverally promiſed to perform the award; the arbitrator awarded each of the two to pay a certain ſum to the third; held that they were *jointly* reſponſible for the ſum awarded to be paid by each.

THIS was an action upon promiſes. The declaration ſtated that on the 23d of *March* 1792 and for the ſpace of three years before that time the defendant *Burredge* rented a farm called *Llwydiarth Farm*, and that the defendant *Roberts* rented it for the two following years, and quitted it on the 25th of *March* 1794. That afterwards the plaintiff rented and occupied it until the making of the agreement hereafter mentioned. That diſputes had ariſen between the defendants and the plaintiff reſpecting the ſtate of the repair of the fences &c. at the reſpective times when the defendants ſeverally quitted the farm, and that doubts had ariſen whether the defendant *Burredge* left the ſame in proper repair and alſo whether the defendant *Roberts* left it in repair, whereupon it was agreed on the 13th of *April* 1796 between the defendants and the plaintiff to refer all ſuch diſputes to the award of *T. Simcocks;* that accordingly by an agreement in writing of that date between the defendant *Burredge* of the firſt part, the defendant *Roberts* of the ſecond part, and the plaintiff of the third part, the ſaid parties jointly and ſeverally agreed to refer all matters in diſpute between them or any or either of them to the determination of *T. Simcocks;* and the defendants thereby for themſelves their executors &c. *jointly and ſeverally* undertook promiſed and agreed to and with the plaintiff that they and their and each of their executors would on his and their reſpective parts abide by perform and keep the award of *T. Simcocks* &c; and the plaintiff undertook and promiſed to and with the defendants jointly and ſeverally and their reſpective executors and adminiſtrators to perform the award on his part. The declaration then ſtated that *Simcocks* made his award &c, in which he directed the defendant *Burredge* to pay 11*l.* 4*s.* to the plaintiff on the 1ſt of *Auguſt* then next, and the defendant *Roberts* to pay him 13*l.* 1*s.* 6*d.* but that they refuſed &c.

The defendant *Roberts* pleaded the general iſſue, and the plaintiff recovered a verdict againſt him; the defendant *Burredge* ſuffered judgment by default, and a writ of enquiry was executed againſt him.

A motion having been made in the laſt term to arreſt the judgment, on the ground that this was not a joint promiſe by the

MANSELL *againſt* BURREDGE.

defendants to anſwer for each other, but ſeveral only, each being to anſwer for himſelf,

Leyceſter now ſhewed cauſe againſt the rule. According to the words of the agreement, it is a joint as well as ſeveral undertaking by the defendants for the failure of each: if the agreement be not ſo conſtrued, the word "jointly" muſt be ſtruck out of the different parts of the agreement. In *Lilly* v. *Hodges* (*a*) the defendant and one *G.* covenanted for themſelves and for each of them with the plaintiff and one *C.* to receive rents due to him and *C.* in *Ireland*, and likewiſe that they and each of them would pay a moiety thereof to each of them the plaintiff and *C.*; it was aſſigned as a breach of covenant that *G.* received 7000*l.*, and that the defendant did not pay the moiety to the plaintiff &c; and on a motion in arreſt of judgment the Court held that the defendant had covenanted for the acts of his companion as well as for his own acts, and diſcharged the rule to arreſt the judgment.

Peake in ſupport of the rule. Here is no joint promiſe by the defendants for the default of each other, but each defendant is anſwerable for himſelf only. The intereſts of the defendants were ſeveral; they had no joint intereſt in reſpect of which the promiſes were made. This was not an agreement made between the two defendants of the one part and the plaintiff of the other, but it was of three parts between one defendant of the firſt part, the other defendant of the ſecond part, and the plaintiff of the third part; and in the agreement it appears that the intereſts of the defendants were ſeveral. By this agreement the defendants meant to ſay that they would jointly perform the award as far as they had any joint intereſt, or there was any joint duty thrown on them, and they would ſeverally perform it as far as reſpected their ſeveral intereſts or ſeveral duties; and therefore the word "jointly" need not be rejected altogether from the agreement. Now the arbitrator awarded nothing to be done by the defendants jointly, but he ſimply awarded each to pay a certain ſum. *Athelſton* v. *Moon*, *Com. Rep.* 547; *Plowd.* 289. In *Slingſby*'s caſe (*b*) it was ruled that where it appears by the declaration that every of the covenantees hath a ſeveral intereſt or eſtate, there when the covenant is made with the covenantees &c, et cum quolibet eorum, theſe words cum quolibet eorum make the covenant ſeveral in reſpect of their ſeveral intereſts. With regard to the caſe in 8 *Mod.* 166, the covenantors were jointly intereſted;

(*a*) 8 *Mod.* 166.

(*b*) 5 *Co.* 18. *b.*

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Mansell *againſt* Burredge.

they were both appointed collectors of the rent, and therefore each became reſponſible for the other.

Lord Kenyon, Ch. J. This is rather a hard caſe on theſe two tenants. Perhaps if it had been ſtated to them at the time of the agreement that each was to become anſwerable for the other, they would have heſitated before they ſigned the agreement: but the words of the agreement are too ſtrong to be got over. It was reaſonable that each ſhould make ſatisfaction for the time each occupied: but by the terms of this agreement they have promiſed jointly and ſeverally, which makes them reſponſible the one for the other.

Per Curiam, Rule diſcharged.

Thurſday, June 29th.

J. Dodd *againſt* Kyffin.

In treſpaſs the defendant may give evidence of title under the general iſſue.

TRESPASS for breaking and entering the plaintiff's cloſe called the *Chapelfield* on the 30th *March* 1793. Plea, the general iſſue. At the trial before the Chief Juſtice of *Cheſter* the plaintiff gave evidence of his being in poſſeſſion of the cloſe at the time of the treſpaſs alleged, by proof of different acts of huſbandry exerciſed by him therein down to that period and afterwards. It appeared that the cloſe belonged to a chapel, of which Mr. *Evans* had been miniſter for ſome years till his death in *December* 1792, during which time it was held under him by one *G. Dodd.* Before the day of the alleged treſpaſs Mr. *Price* had ſucceeded as miniſter of the chapel; and the defendant offered to call a witneſs to prove that previous to that day *Price* had verbally demiſed the cloſe to him the defendant. The Chief Juſtice ſaid he would receive any evidence to ſhew *the actual poſſeſſion* (*a*) out of the plaintiff at the time of the ſuppoſed treſpaſs, but he thought that under the plea of not guilty he could not receive any evidence of title or of the right of poſſeſſion being in the defendant; nothing being in iſſue but the fact of the treſpaſs on the actual poſſeſſion of the plaintiff. Some evidence was afterwards given to ſhew a poſſeſſion in *Price* at the time; and the Chief Juſtice left the whole to the jury to find their verdict according as they believed that the poſſeſſion was in or out of the plaintiff at the time; and they found a verdict for the plaintiff.

(*a*) The ſame witneſs had before proved facts which rendered the queſtion of poſſeſſion doubtful.

Manley

1797.
Dodd against Kyffin.

Manley in the laſt term obtained a rule to ſhew cauſe why the verdict ſhould not be ſet aſide becauſe the evidence offered had been rejected; and alſo becauſe, admitting the poſſeſſion to be dubious, treſpaſs would not lie.

Leyceſter and *Hinchliffe* now ſhewed cauſe againſt the rule, and contended that title could not be given in evidence on the general iſſue in treſpaſs, but if meant to be inſiſted on it ought to have been pleaded. They admitted that a leaſe from a third perſon might be given in evidence to diſprove the fact of the plaintiff's poſſeſſion; but the evidence in queſtion was not offered on that ground. They mentioned *Dove* v. *Smith*, 6 *Mod.* 153. where *Holt*, Ch. J. ſaid "upon not guilty the defendant could not give any matter of right in evidence." *Bull. Ni. Pri.* 90. (*a*), and *Bartholomew* v. *Ireland*, *Andr.* 108, in which latter they obſerved there was a plea of liberum tenementum, and conſequently what was ſaid as to giving ſuch evidence on the general iſſue was extrajudicial. But

The Court were clearly of opinion that the defendant ought to have been permitted to give evidence of title and of right to poſſeſſion under the general iſſue; and therefore they made the

Rule abſolute.

(*a*) Vid. *Tri. per Pais*, 526.

Friday, June 30th.

FISHER and Another Executors of PERRY *againſt* BRANSCOMBE.

The Same *againſt* W. and J. SUTTON, Executors of BOWEN.

If an action be brought here againſt bail on a recognizance of bail taken in C. B., they have the ſame indulgence (of 8 days in full term after the return of the writ againſt them) to render the principal as if the recognizance had been taken in this court.

IN *Michaelmas* term laſt the plaintiffs ſued Sir *W. Lewes* in *C. B.*, in which action *Branſcombe* and *Bowen* became bail above. The defendant Sir *W. Lewes* ſuffered judgment by default, and afterwards brought a writ of error here; and the judgment given in the Common Pleas was affirmed here in laſt *Eaſter* term. In the ſame term, after the return of the ca. ſa. againſt the principal, the plaintiffs commenced ſeparate actions here on the recognizance of bail againſt *Branſcombe* and *Bowen* by writs returnable the laſt return of that term, the 29th of *May*. On

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Fisher *againſt* Branscombe.

Thurſday the 15th of *June* Sir *W. Lewes* ſurrrendered himſelf in diſcharge of his bail before a judge of the Common Pleas (*a*), by whom he was committed to the cuſtody of the Warden of the Fleet. The defendants obtained rules to ſhew cauſe why the proceedings in theſe actions againſt the bail ſhould not be ſtayed upon payment of coſts. The queſtion in this caſe was whether as theſe actions were brought in this court on a recognizance of bail entered into in a cauſe in the Common Pleas the bail were entitled to the ſame indulgence as if the actions had been commenced in the Common Pleas;

Erſkine, *Mingay*, and *Garrow*, in ſhewing cauſe againſt the rules for the ſeveral defendants, contended that they were, becauſe theſe actions being brought for a breach of a recognizance entered into in the Common Pleas the ſame conſtruction muſt be put on it as if the actions had been brought in that court; that the court in which the actions were brought could not vary the nature of the indemnity; and that according to the practice of that Court this ſurrender was not made in time, that practice only giving indulgence to the bail to ſurrender the principal on or before the quarto die poſt (*b*) of the return of the writ againſt them, which was on the 2d of *June*, and the ſurrender not being made until the 15th of *June*. They admitted that if the practice of this Court were to govern the caſe the ſurrender was made in time, inaſmuch as by the practice of this Court the bail have eight full days (*c*) in term after the return of the proceſs againſt them to render the principal. And they relied on *Shuttle* v. *Wood* (*d*), where on debt in *B. R.* on a recognizance of bail taken in *C. B.* the Court conſidered that they were governed by the practice of the Court where the recognizance was taken.

Gibbs, *Marryat*, and *Peake*, in ſupport of the rule, ſaid, that this was not a queſtion on the conſtruction of the recognizance, for that the recognizance was forfeited by the bail not rendering the principal before the return of the ca. ſa. (*e*), but on the practice or rather the indulgence that is allowed to the bail by the court in which the action happens to be brought. That as the plaintiffs

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(*a*) In the courſe of the argument it was ſtated that as the condition of the recognizance was that the defendant, if condemned in the action, ſhould pay the condemnation money or *render himſelf a priſoner to the Fleet* for the ſame &c, it was neceſſary to ſurrender the principal in the Common Pleas, and that a ſurrender here would not have been a compliance with the condition of the recognizance. *Hargrave* v. *Rogers*, *Cro. Jac.* 97.

(*b*) Vid. 2 *H. Bl. Rep.* 118.

(*c*) Rule of Court, *Tr.* 1 *Ann.*

(*d*) 6 *Mod.* 132.

(*e*) Vid. 1 Ld. *Raym.* 156, 7; and *Rawlinſon* v. *Gunſton, ante*, 6 vol. 284.

Fisher *againſt* Branscombe.

had choſen to bring the actions here, they had thereby conſented that the bail ſhould have the indulgence that this Court allows to the bail. That according to that rule of indulgence the render was made in time, and the proceedings againſt the bail ought conſequently to be ſtayed.—It was alſo ſuggeſted that in truth there was not much real difference in the two courts reſpecting the indulgence given to the bail, though nominally it is greater in this court than in the Common Pleas; for though here they have eight full days in term after the return of the writ againſt them, and in the Common Pleas they have only until the quarto die poſt of the return of that writ, yet ſuch writ muſt in that court be ſerved four days before it is returnable.

Lord Kenyon, Ch. J. There is no doubt about the conſtruction of the recognizance; the recognizance is undoubtedly forfeited. When the queſtion was firſt ſtated, I thought that it depended on the condition of the recognizance, and if it had, I ſhould have had no doubt but that it muſt have been conſtrued according to the rules of that court in which it was taken: but now I am thoroughly ſatisfied that the queſtion depends altogether on the indulgence given to the bail by the rules and practice of this court. There are two modes of proceeding againſt bail, either by ſcire facias or by action on the recognizance. The latter is the moſt harſh and expenſive; and in order to ſoften the hardſhip of it, the Court have granted a certain indulgence to the bail; by a rule of court the bail, when ſued by action, "have liberty to render the defendant in diſcharge of his bail by the ſpace of eight entire days in full term next after the return of the latitat or other proceſs ſued out againſt them." Here the principal was rendered within that time, and therefore the proceedings againſt the bail ought to be ſtayed. And from what has been now ſtated at the bar reſpecting the practice of the court of Common Pleas in this particular, it appears that there is not much ſubſtantial difference between the indulgence granted by the one court and the other.

Per Curiam, Rule abſolute.

Bollard and Wife Adminiſtratrix *againſt* Spencer.

Friday, June 30th.

If the converſion were in the time of the adminiſtratrix and ſhe be nonſuited in the action of trover, ſhe is liable to pay coſts though ſhe never were in fact in poſſeſſion of the goods ſince the inteſtate's death.

THE plaintiffs declared in trover for the goods of the inteſtate, of which the wife *as adminiſtratrix was poſſeſſed*, and which came to the defendant's hands by whom they were converted &c. The plaintiffs being nonſuited at the trial, the defendant obtained a rule laſt term for referring it to the Maſter to tax the coſts for him, which rule was make abſolute without any cauſe being ſhewn: but

Topping moved on a former day in this term to diſcharge that rule, contending that the adminiſtratrix, having ſued of neceſſity in that character, becauſe it appeared at the trial (*a*) that the goods had never come to her poſſeſſion ſince the inteſtate's death, though the converſion was in her time, was not liable to pay coſts. And he cited *Cockerill* et Ux. Executrix of *Moody* v. *Kynaſton* (*b*), where in trover by an executrix, *Buller*, J. ſaid that, if the goods which were the ſubject of the action were never in the actual poſſeſſion of the executrix, it was abſolutely neceſſary for her to declare in that character; though if no demand were made in the lifetime of the teſtator, it was neceſſary to declare on a converſion after his death.

Chambre ſhewed cauſe. What is ſaid in the caſe mentioned muſt be a miſtake; for there are many authorities to ſhew that where the converſion is in the time of the executor, he is liable to pay coſts if he fail in the action. *Atkey* v. *Heard*, *Cro. Car.* 219. Anonym. 1 *Ventr.* 109. *Jenkins* v. *Plume*, 6 *Mod.* 91. 181. *Salk.* 207. *Pauler* v. *Delander*, *Andr.* 357; a caſe cited where both the trover and converſion were in the life of the teſtator and yet the executor paid coſts. The rule is laid down in *Harris* v. *Hanna* (*c*) that where the cauſe of action ariſes in the time of the executor, as in this caſe the converſion, he ſhall pay coſts if he fail, becauſe it was not neceſſary to name himſelf executor (*d*); and the rule was exploded that the liability to pay coſts depended on the queſtion whether the thing recovered would be aſſets or not.

Lord Kenyon, Ch. J. The rule has been long ſettled that where an executor or adminiſtrator brings trover on his own poſſeſſion,

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(*a*) This was ſtated in an affidavit, but the Court ſaid the queſtion could not depend on any facts not appearing on the record.

(*b*) *Ante*, 4 vol. 277.

(*c*) *Rep. temp. Hardw.* 204.

(*d*) Vid. *Goldthwayte* v. *Petre*, *ante*, 5 vol. 234. S. P.

ſeſſion, alleging the converſion after the teſtator's or inteſtate's death, and fails, he muſt pay the coſts. There muſt have been ſome miſtake in the caſe cited of *Cockerill* v. *Kynaſton.* Suppoſe an inteſtate dies poſſeſſed of a term for years, and the adminiſtrator inſtead of ſelling the term receives the rent for ſeveral years, this rent is part of the aſſets of his inteſtate, and yet if any part of that rent be unpaid the adminiſtrator need not in an action to recover it declare as adminiſtrator. The rule in favor of executors and adminiſtrators is already ſufficiently extenſive: we all of us remember a variety of actions improperly brought by them, and which would not perhaps have been brought had it not been for the privilege they have of being exempt from paying coſts. The rule, excuſing them from paying coſts, is founded on this principle that they are not ſuppoſed to be conuſant of the real ſituation of the teſtator's affairs; and therefore when they act according to the beſt of their judgment they are not liable to coſts. But even when they are ſued, if they plead a plea which is falſe within their own knowledge the judgment for the coſts is de bonis teſtatoris, et ſi non de bonis propriis. In this caſe the action was brought by the adminiſtratrix for a cauſe of action ariſing in her own time, and as ſhe has failed there is no reaſon why the defendant ſhould not have his coſts.

So the rule, to diſcharge the former rule, was diſcharged.

GEORGE *againſt* CLAGETT and Another.

Friday, June 30th.

If a factor, who ſells under a del credere commiſſion, ſells goods as his own, and the buyer knows nothing of any principal, the buyer may ſet off any demand he may have on the factor againſt the demand for the goods made by the principal.

ON the trial of this action, which was aſſumpſit for goods ſold and delivered to the amount of 142*l.* 1*s.* 9*d.*, before Lord *Kenyon* at the Guildhall Sittings, the caſe appeared to be this. The plaintiff a clothier at *Frome* employed Meſſrs. *Rich* and *Heapy* in *London*, Blackwell-hall factors, as his factors under a commiſſion del credere, who beſides acting as factors bought and ſold great quantities of woollen cloths on their own account, all their buſineſs being carried on at one warehouſe. The factors ſold at twelve months credit, and were allowed two and a half *per cent.* On the 30th of *September* 1795 *Delvalle*, a tobacco broker, and who had been in habits of dealing with the defendants, bought ſeveral parcels of tobacco of them and gave them in pay-

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GEORGE *againſt* CLAGETT.

ment a bill of exchange for 1198*l.* 16*s.* drawn by one *Fiſher* on *Rich* and *Heapy* on the 24th of *September* 1795, payable two months after date to *J. Stafford* who indorſed to *Delvalle*, who indorſed it over to the defendants, it having been previouſly accepted by *Rich* and *Heapy*. On the 12th of *October* 1795 the defendants bought a quantity of woollen cloths for exportation of *Rich* and *Heapy*, amounting to 1237*l.* 18*s.* 3*d.* at twelve months credit; the goods were taken out of one general maſs in *Rich* and *Heapy*'s warehouſe; *Rich* and *Heapy* made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in *November* 1795 *Rich* and *Heapy* became bankrupts; and afterwards on the 20th of the ſame month the plaintiff gave the defendants notice not to pay *Rich* and *Heapy* for certain cloths ſpecified, part of the above, amounting to 142*l.* 1*s.* 9*d.*, they having been his property, and having been ſold on his account by *Rich* and *Heapy* on commiſſion. The queſtion was whether the defendants were or were not entitled to ſet off their demand againſt *Rich* and *Heapy* on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord *Kenyon* was of opinion that they were, as well on principle as on the authority of *Rabone* v. *Williams* (*a*); and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial had, on the authority of the caſe of *Eſtcott* v. *Milward*, *Co. Bank. Laws* 236,

Gibbs and *Giles* were now to have ſhewn cauſe againſt that rule: but

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(*a*) RABONE jun. *v.* WILLIAMS, Mid^x. Sittings after *Mich.* 1785; which was thus ſtated.—Action for the value of goods ſold to the defendant by means of the houſe of *Rabone* ſen. and Co. at *Exeter*, factors to the plaintiff. The defendant, the vendee of the goods, ſet off a debt due to him from *Rabone* and Co., the factors, upon another account, alleging that the plaintiff had not appeared at all in the tranſaction, and that credit had been given by *Rabone* and Co., the factors, and not by the plaintiff. Lord *Manſfield*, Ch. J.—"Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the perſon contracting with him has a right to conſider him to all intents and purpoſes as the principal; and though the real principal may appear and bring an action upon that contract againſt the purchaſer of the goods, yet that purchaſer may ſet off any claim he may have againſt the factor in anſwer to the demand of the principal. This has been long ſettled."—Upon this opinion, the reſt, being a mere matter of account, was referred. In *Bayley* v. *Morley*, *London* Sittings after *Mich.* 1788. Lord *Kenyon* recognized the law of this caſe.

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Erſkine and *Walton* were called upon to ſupport it. They relied on the caſes of *Scrimſhire* v. *Alderton* (*a*), and *Eſtcott* v. *Milward* as reported in *Co. Bank. Laws*, to ſhew that under the circumſtances of this caſe the principal might reſort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

But a more accurate note of the caſe of *Eaſtcott* v. *Milward* (*b*) having now been obtained from Mr. J. *Buller* before whom that cauſe was tried, and read,

The Court were clearly of opinion that the directions given by the learned judge on the trial of this cauſe were right; and that this caſe was not diſtinguiſhable from that of *Rabone* v. *Williams*. Therefore they

Diſcharged the rule (*c*).

(*a*) 2 *Str.* 1182.

(*b*) *London* Sittings after *Mich.* 1783. Action for goods ſold. The goods were ſold by *Farrar* a corn factor, who gave no account of the ſale to the plaintiff, nor made any entry of it in his books. He was inſolvent for ſome time before, had avoided all dealing for a month, had deſired that there might be no buying in his name, and had not dealt with the defendant for a year before, but was then in his debt. There was a verdict for the plaintiff on the ground of fraud.

(*c*) The ſame point was alſo ruled by Lord *Kenyon* in *Stracey*, *Roſs*, and others, *v.* *Deey*, *London* Sittings after *Mich.* 1789. Aſſumpſit for goods ſold; pleas non aſſumpſit and a ſet-off. The plaintiffs jointly carried on trade as grocers, but *Roſs* was the only oſtenſible perſon engaged in the buſineſs, and appeared to the world as ſolely intereſted therein. By the terms of the partnerſhip *Roſs* was to be the apparent trader, and the others were to remain mere ſleeping partners. The defendant was a policy broker, and being indebted for grocery (as he conceived) to *Roſs*, he effected inſurances and paid premiums on account of *Roſs* ſolely, to the amount of his debt, under the idea that one demand might be ſet off againſt the other. *Roſs*'s affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refuſed by him upon the ground of his having been deceived by the other partners keeping back and holding out *Roſs* as the only perſon concerned in the trade. Lord *Kenyon*, Ch. J. was of opinion that as the defendant had a good defence by way of ſet-off as againſt *Roſs*, and had been by the conduct of the plaintiffs led to believe that *Roſs* was the only perſon he contracted with, they could not now pull of the maſk and claim payment of debts ſuppoſed to be due to *Roſs* alone, without allowing the parties the ſame advantages and equities in their defence that they would have had in actions brought by *Roſs*.

Verdict for the defendant.

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Saturday, July 1ſt.

The KING *againſt* The Inhabitants of MATHON.

The pariſh officers by a certificate engaged to receive the certificated perſon, therein ſtated to be an unmarried woman, and the child of which ſhe was then pregnant, and all other children ſhe might afterwards have: —held that it did not extend to an illegitimate child born ſeveral years afterwards.

ON an appeal to the *Herefordſhire* ſeſſions againſt an order of juſtices, by which *R. Cagear* otherwiſe *Vobe Taylor*, his wife and four children, were removed from *Cradley* to *Mathon*, the Seſſions confirmed the order, ſubject to the opinion of this Court on the following caſe.

Margaret Cagear ſingle woman, being ſettled at *Mathon*, and being then pregnant of an illegitimate child that was afterwards born a baſtard, went to *Cradley* in 1738 under a certificate from *Mathon* in which the pariſh officers of *Mathon* "for themſelves and their ſucceſſors with the conſent of the pariſhioners engaged to relieve and receive *M. Cagear* with *the child of which ſhe was then pregnant and all other children that ſhe might thereafter have* until ſhe or they ſhould acquire a ſubſequent ſettlement, whenſoever ſhe or any of them ſhould become chargeable to or aſk relief of their pariſh." *M. Cagear* reſided in *Cradley* under that certificate until her death, and in 1746 had the preſent pauper (*R. Cagear*) an illegitimate child, who continued to reſide in *Cradley* until the preſent order of removal without having done any act to gain a ſettlement for himſelf.

Burrow in ſupport of the order of Seſſions. Although it has been ſaid in ſeveral caſes that the Legiſlature, when they paſſed the ſtat. 8 & 9 *W.* 3. *c.* 30., only intended to comprehend legitimate children in certificates granted under it, yet in ſome caſes the certificate has been extended to illegitimate children. In *R.* v. The Inhabitants of *Ipſley* (*a*) where the certificate was granted to an unmarried woman, reciting her pregnancy, and undertaking to provide for the child ſhe then went with, it was holden that the certificate was binding on the pariſh as far as reſpected the after-born baſtard child. Then there is the ſame reaſon to extend the preſent certificate to this pauper; the certificate mentioning in expreſs terms the mother's ſituation, and extending to all after-born children.

Lord KENYON, Ch. J. (ſtopping *P. Stanhope* who was on the other ſide). It is not now neceſſary to queſtion the propriety of the deciſion in *R.* v. *Ipſley*. That certainly went much beyond the former caſes on this ſubject. However that is diſtinguiſhable

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(*a*) *Burr. S. C.* 650; and 2 *C. Bott.* 9. *pl.* 23.

from the preſent caſe. That only extended to the child with which the woman was then pregnant; and a child in ventre ſa mere is capable of being deſcribed. But this child was not born until eight years after the certificate was granted; and being illegitimate, he is not included within the general words in the certificate, which extends only to legitimate children.

Per Curiam, Order of Seſſions quaſhed.

The King *againſt* J. Bagshaw Eſq. and four others.

Saturday, July 1ſt.

Under a turnpike act the truſtees had power to turn roads through private grounds, making ſatisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to ſummon a jury to aſcertain the damage and to order ſuch ſum ſo aſcertained to be paid to the owners: This Court quaſhed an inquiſition of the jury and an order of the truſtees under this act, becauſe it did not appear on the face of the proceedings that *any notice* had been given to the owners of the land.

BY ſtat. 35 *Geo.* 3. *c.* 154. to enlarge the term and powers of two acts, 29 *Geo.* 2. and 16 *Geo.* 3. for repairing and widening certain turnpike roads, power is given to five truſtees to widen divert and turn any part of the ſaid roads, and to vary the roads through any private grounds, making ſatisfaction to the ſeveral perſons intereſted therein for the damage they might thereby ſuſtain; power is alſo given to the truſtees to contract and agree with the owners of ſuch lands &c. The ſtatute then enacts "That if any perſons intereſted in ſuch lands *upon notice* to him or them given ſhould for the ſpace of twenty days next after ſuch notice neglect or refuſe to treat, or ſhould not agree &c, then and in every or any ſuch caſe the ſaid truſtees ſhould cauſe ſuch damage or recompence to be enquired into and aſcertained by a jury &c; and after the ſaid jury ſhould have enquired of and aſſeſſed ſuch damage &c. the ſaid truſtees ſhould order adjudge and determine the ſum of money ſo aſſeſſed &c to be paid to the ſaid owners according to the verdict or inquiſition of ſuch jury &c." Under this power the truſtees turned a road between *Cheſterfield* and *Sheffield*, and made the new road through four cloſes of land belonging to the five defendants. They tendered the ſum of 100*l.* to the defendants as a recompence, which not being accepted the truſtees ſummoned a jury, who aſſeſſed the damage at 100*l.*; upon which the truſtees made their order or adjudication, in which it was recited that a diſpute had ſubſiſted between the truſtees and the defendants reſpecting the damage ſuſtained by the latter and the recompence due to them, and that under the powers of the act they had cauſed a jury to be ſummoned impanelled and ſworn &c, who having viewed the premiſes and heard counſel and evidence thereon had aſſeſſed the damage and recompence at the ſum of 100*l.*; and in which the truſtees ordered adjudged and determined the ſaid ſum of 100*l.* to be paid to the defendants according to their reſpective eſtates &c. The proceedings having been removed here by certiorari,

Nolan moved on the firſt day of this term for a rule to ſhew cauſe why the verdict inquiſition and aſſeſſment of damages and alſo the order and adjudication of the truſtees ſhould not be quaſhed, for ſeveral objections appearing on the proceedings. 1ſt. It does not appear that the truſtees acted within their juriſdiction; *no notice* appears to have been given to the defendants, in which caſe only the truſtees had juriſdiction to make the order. In *R.* v. The Mayor &c. of *Liverpool* (*a*) this preciſe point was ruled. [He was proceeding to ſtate other objections, but the Court granted a rule niſi upon this.]

Gibbs and *Balguy*, who were now to have ſhewn cauſe, admitted that it did not appear in expreſs terms either on the inquiſition or the order that any notice had been given to the defendants, but they obſerved that it was ſtated that counſel had been heard before the jury, from whence they ſaid either that notice might be inferred or that the neceſſity of it was waved. But

The Court (ſtopping *Clarke* and *Nolan* in ſupport of the rule) ſaid that notice to the parties intereſted was the foundation of the whole proceedings below, and that therefore it ſhould have been ſtated; for if no notice were given, the truſtees had no juriſdiction. And with reſpect to counſel having been heard before the jury, they ſaid it did not appear that any *counſel for the defendants* had been heard.

Rule abſolute.

(*a*) 4 *Burr.* 2244.

Saturday, July 1ſt.

Snaith and others Aſſignees of Parke *againſt* Gale.

Where *A.* lent his acceptances to the defendant before his bankruptcy, but which were not paid till afterwards, *A.* may maintain an action againſt the defendant for money paid to his uſe, notwithſtanding his bankruptcy and certificate, and notwithſtanding the defendant before his bankruptcy gave his receipt to *A.* acknowledging the receipt of ſo much money as the acceptances amounted to.

ASSUMPSIT for money had and received, and for money lent, and money paid to the defendant by the bankrupt before his bankruptcy. Pleas, 1ſt, The general iſſue; and 2dly, the bankruptcy of the defendant before the cauſe of action accrued. It appeared that *Parke* and *Gale* were both mahogany merchants; and that

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the former had accepted bills drawn on him by the latter payable to his order, for his accommodation. The firſt of theſe bills was paid by *Parke* before *Gale*'s bankruptcy, and was therefore out of the queſtion. The ſecond was for 240*l.* dated 4th *January* 1793, though in fact drawn on the 8th *February* payable four months after date, which conſequently became due on the 7th *May*. The third was for 291*l.* 3*s.* dated 4th *February* 1793, though in fact drawn the 2d *April*, payable four months after date, and which became due 7th *June*. The firſt of theſe two laſt bills was taken up by *Parke* between the time of *Gale*'s bankruptcy and the iſſuing of the commiſſion againſt him; the laſt was taken up after the iſſuing of *Gale*'s commiſſion. *Gale* became a bankrupt on the 3d *May* 1793, previous to which and to the agreement hereafter mentioned he had negotiated theſe bills. On the 8th *April* 1793 an agreement under ſeal was entered into between *Parke* and *Gale*, as a collateral ſecurity to the former for his acceptances, whereby in conſideration of 833*l.* 1*s.* (namely the ſums contained in the ſaid three bills and intereſt) paid by *Parke* to *Gale*, the receipt of which *Gale* thereby acknowledged, the latter ſold and aſſigned over to *Parke* certain cargoes of mahogany, then expected to arrive from the Bay of *Honduras* and conſigned to *Gale*: and *Gale* alſo covenanted in caſe of the loſs of the cargoes to aſſign to *Parke* the policies of inſurance on the ſame; and at the ſame time *Gale* ſigned the following receipt thereon; "Received the day and year within written of the within named *T. Parke* 833*l.* 1*s.* being the "purchaſe money within mentioned. *J. Gale*." The cargoes arrived the beginning of *Auguſt*; but bills of exchange came tacked to the bills of lading, ſo that *Parke* could not avail himſelf of the conſignments without accepting thoſe bills, which not being deemed prudent to do, he relinquiſhed the conſignment to *Gale* on his repreſentation that it would be no ſecurity. A verdict was taken for the plaintiffs, who were the aſſignees of *Parke* who had alſo become bankrupt, for the amount of the two laſt bills paid by him after *Gale*'s bankruptcy, with liberty to the defendant to move to ſet it aſide if the debt were proveable under *Gale*'s commiſſion in conſequence of the agreement between the parties.

Law and *Marryatt* in ſupport of the rule for ſetting aſide the verdict. If the debt from *Gale* to *Parke* in conſequence of his acceptances were proveable under *Gale*'s commiſſion, this action is not maintainable. Where by the terms of the contract it is a debitum in præſenti at law, ſuch debt is proveable although the conſideration

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conſideration for it be a future contingent liability. In the caſe Ex parte *Maydwell* (*a*), he having agreed to lend his acceptance to one *Prior*, the latter together with *Stevens* his ſurety gave *Maydwell* a note dated 8th *November* 1784, whereby they jointly and ſeverally promiſed to pay him the ſum advanced, part thereof on the 18th and the remainder on the 22d of *January* then next. *Prior* became a bankrupt on the 18th *December* 1784, and *Stevens* on the 10th of the ſame month, which was prior to the acceptance being due, or the joint and ſeveral note being payable. But upon petition the Lord Chancellor directed that *Maydwell* ſhould be admitted to prove his note under *Stevens*' commiſſion. *Martin* v. *Court* (*b*) is to the ſame effect. Here *Gale* by an inſtrument under ſeal acknowledged himſelf indebted in 833*l*., for ſecuring which he purported to aſſign certain cargoes of mahogany; theſe it is true turned out afterwards to be unprofitable conſignments, in conſequence of bills of lading for the amount being tacked to them; but the receipt given by *Gale* does in terms purport to be an acknowledgment of a preſent debt, and was proveable under his commiſſion to the extent of *Parke*'s ſubſequent damnification. Whenever a man acknowledges a debt or receipt of money generally, the law implies a preſent promiſe to pay it; and a future liability is as good a conſideration for ſuch promiſe as an executed or paſt conſideration.

Erſkine and *Walton*, *contrà*, ſaid that all the caſes alluded to were caſes of croſs ſecurities, which made them differ from the preſent, where there was no legal ſecurity in the hands of *Parke* which he could prove under the commiſſion. Neither the aſſignment, which failed altogether, nor the receipt, could have been proved as a debt under the commiſſion. They were then ſtopped by the Court.

Lord Kenyon, Ch. J. This differs from all the former caſes; for here was no debt due at law from the defendant to *Parke* at the time of the defendant's bankruptcy: but the debt altogether aroſe afterwards by the payment of the acceptances by *Parke*. No action could have been maintained at law on this acknowledgment: in the other caſes legal ſecurities were taken, upon which the party might have been ſued.

Per Curiam, Rule diſcharged.

(*a*) *Co. Bank. Law* 123. (*b*) *Ante*, 2 vol. 640.

The KING *againſt* MILES.

Monday, July 3d.

The 8 & 9 *W.* 3. *c.* 11., giving coſts in all *ſuits* of ſcire facias, does not extend to a ſcire facias to repeal a patent proſecuted in the name of the king.

IN ſcire facias at the ſuit of the crown to repeal a patent granted to the defendant for making and vending a particular ſort of lamp, a verdict was given for the crown. Whereupon a rule had been obtained for referring it to the coroner and attorney of the king to tax the coſts to be paid by the defendant to the proſecutor; which rule

Erſkine now moved to ſet aſide, on the ground that there was no ſtatute which gives coſts in this caſe, and on the general rule that no coſts are payable where the crown is a party, unleſs by force of ſome particular ſtatute.

Mingay, *Garrow*, and *Wigley*, ſhewed cauſe, and at firſt adverted to the 8 & 9 *W.* 3. *c.* 11. which gives coſts in all ſuits upon any writ or writs of ſcire facias, but which they afterwards admitted refers merely to civil ſuits, as it mentions *plaintiffs* and *defendants*, and *award of execution*. And they mentioned the caſe of *Brewſter* v. *Weld*, 6 *Mod.* 229. as an inſtance of a ſcire facias to repeal a patent at the ſuit of a private ſubject, who was prejudiced thereby. They finally admitted that the former rule could not be ſupported, of which opinion were

The Court, who ſaid that this caſe fell within the general rule that no coſts are either paid or received where the crown is the proſecutor, unleſs in ſome particular caſes, ſuch as informations in nature of quo warranto by the ſpecial proviſion of the Legiſlature (*a*).

Rule abſolute.

(*a*) 9 *Ann.* *c.* 20. *ſ.* 5.

PATCHETT *againſt* BANCROFT and others.

Monday, July 3d.

One warrant of diſtreſs for the amount of ſeveral duties impoſed by different acts of parliament, each giving a power of diſtreſs, is legal. The judgment of the commiſſioners of land-tax on appeal is concluſive in an action of treſpaſs brought againſt the officer for levying under a warrant of diſtreſs.

IN treſpaſs for taking the plaintiff's cattle, tried at *York* before *Rooke* J., it appeared that the cattle were taken under a warrant of diſtreſs for the aggregate amount of ſeveral taxes (*a*), one of which was the land tax on ſome woods, which the plaintiff at

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(*a*) *Viz.* the land tax, wood tax, commutation tax, window duty, houſe duty, horſe duty, ſervants' tax &c.

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PATCHETT *againſt* BANCROFT.

the time of the diſtreſs made refuſed to pay, though he was ready and offered to pay the reſt if the defendants would have taken them only. The ground of the plaintiff's objection to pay that particular aſſeſſment was becauſe it was to raiſe a ſum for the uſe of the pariſh over and above the proportion of the land tax for that pariſh payable to government; and he appealed to the commiſſioners appointed under the act parliament, who upon hearing the parties confirmed the aſſeſſment for the whole. The learned judge thought that, as the objectionable tax had been confirmed on the appeal, it could not now be queſtioned in this action; and that it was ſufficient for the defendants to ſhew a general right to diſtrain; and therefore he nonſuited the plaintiff, with liberty to move to ſet aſide the nonſuit, and enter a verdict for him for 24*l.* if this Court ſhould be of opinion that the action was well founded. Accordingly a rule niſi was obtained for that purpoſe in *Eaſter* term laſt, on the ground that there ſhould have been a ſeparate warrant for each tax; and that a diſtreſs under one warrant for the amount of all the taxes was illegal; for which were cited *Rogers* v. *Birkmire* (*a*), *Clark* v. *Lucas* (*b*), and *Stephens* v. *Houghton* (*c*).

Cockell Serjt., *Chambre*, and *Raine* ſhewed cauſe (*d*). The only queſtion which can be made in this form of action is whether the defendants were entitled to diſtrain for any thing or not; for if they were, the treſpaſs is juſtified; and the quantum of the ſum diſtrained for, if too much were taken, can only be queſtioned in an action on the caſe for an exceſſive diſtreſs. The defendants were entitled under the ſtatute to plead the general iſſue and give the ſpecial matter in evidence: but that cannot be deemed to put them in a worſe ſituation than if they had been left to their ſpecial plea. Now they might have avowed in this caſe for a different cauſe (*e*) from that for which they had diſtrained; and if they had avowed for any one of the taxes, which it is admitted was lawfully aſſeſſed, that would have been a ſufficient anſwer to the treſpaſs, notwithſtanding the exceſs. The defendants, who are the collector of the land tax and his aſſiſtants, could not judge of the exceſs; that was a queſtion for the opinion of the commiſſioners alone to whom the appeal was made, and who alone were competent to judge of the quantum.

(*a*) 2 *Stra.* 1040. and *Rep. temp. Hardw.* 245.

(*b*) Cited ibid.

(*c*) 1 *Barnard.* 128. 214.

(*d*) In the laſt term.

(*e*) Vid. *Bull. N. P.* 55. cites 3 *Co.* 26. *a.*

quantum (*a*). The aſſeſſment is entire though for ſeparate taxes. As to *Rogers* v. *Birkmire*, the only point determined there was that where there were diſtinct demiſes of different parcels of land, a diſtreſs on one of thoſe parcels for rent iſſuing out of both was bad, which is admitted; but it does not bear on this queſtion.

Law, *Wood*, and *Ainſlie*, *contrà*. The ſeveral taxes which were diſtrained for under one warrant are duties impoſed by different acts of parliament, each giving a different power of diſtreſs, therefore there ought to have been ſo many different warrants, otherwiſe the ſubject is perplexed; for the plaintiff might have a good defence to one and not to others: but if they are confounded together in one general aſſeſſment, and levied under one warrant of diſtreſs, he is deprived of that election. Suppoſing a horſe or other indiviſible chattel taken as a diſtreſs, and the defendant in replevin were to avow under ſeveral authorities, as in this caſe for different taxes, if he were right as to one avowry he would have judgment pro retorno habendo, and if he failed in others there would be judgment for the plaintiff with damages; ſo that there would be different and inconſiſtent judgments on the ſame record; which ſhews that a diſtreſs for different ſubject matters is bad. And ſo it was held in *Clark* v. *Lucas*, *M.* 2 *Geo.* 2. (*b*), that a joint diſtreſs for three ſeveral amerciaments in an inferior court for three ſeveral defaults of appearance was bad. Beſides it is impoſſible where the diſtreſs is for ſeveral cauſes to ſay how much ſhould be returned for one cauſe and how much for another. [*Aſhhurſt*, J. aſked, how it would be, according to that argument, if a man had two warrants of diſtreſs, and there were but one thing (ex. gr. a horſe) diſtrainable on the premiſes?] Anſwer—The party could only take it for one cauſe at a time; for being once taken, it is in cuſtodiâ legis, and cannot be taken for another cauſe. The queſtion of the quantum neceſſarily ariſes in this caſe, becauſe there was a tender of all the other taxes except the land tax for the woods; and it is clear that a diſtreſs after a ſufficient tender is a treſpaſs; ſo that the legality of the diſtreſs for that aſſeſſment muſt be ſupported in order to eſtabliſh the defence to this action. There is no diſpute about the quantum of that particular aſſeſſment, upon which alone the judgment of the commiſſioners would be concluſive: but the

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(*a*) *Hutchins* v. *Chambers*, 1 *Burr.* 580. Vi. *Durrant* v. *Boys*, *ante*, 6 vol. 580.

(*b*) Cited in *Rep. temp. Hardw.* 246.

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legality of it in toto is in diſpute; and it is contended that the commiſſioners have exceeded their juriſdiction. Where a man enters by authority of law, if he abuſe that authority, he is a treſpaſſer ab initio; and ſo is one who diſtrains and ſells for two years rent when one only is due. So here, the defendants having authority to take for one cauſe, and taking for another alſo, are treſpaſſers. The action for an exceſſive diſtreſs only lies where the diſtreſs is legally made and for a legal cauſe, but more is taken than was ſufficient for the purpoſe: but here the objection is to the whole beyond the ſum tendered; and this diſtreſs was in effect one execution upon ſeveral judgments, which is bad; and the execution, being entire, if bad in part is no juſtification to the treſpaſs.

The Court took time to conſider of their opinion, which was now delivered by

Lord KENYON, Ch. J. As all the taxes were confirmed on appeal, however improper perhaps the one objected to was, it muſt be binding on the parties; and then the warrant of diſtreſs, though it included them all, was properly iſſued. The conſequence of which is that the rule for a new trial muſt be diſcharged, and the nonſuit ſtand.

Rule diſcharged.

Tueſday, July 4th.

HEPPEL *againſt* KING.

After an attachment againſt the ſheriff for not bringing in the body the Court will only relieve him upon paying the whole debt and coſts, and not merely the ſum ſworn to and coſts.

THE defendant, being arreſted on a bailable writ indorſed for bail for 100*l.* and upwards, gave a bail bond to the ſheriff; but the bail above not juſtifying in due time an attachment was granted againſt the ſheriff for not bringing in the body.

Lawes on a former day moved to ſtay proceedings againſt the ſheriff on payment of 100*l.* the amount of the debt ſworn to, together with the coſts in the original action, and thoſe in the proceedings againſt the ſheriff. He admitted that according to the caſe of *Orton* v. *Vincent* (*a*) the bail below were liable to the whole debt and coſts, though exceeding the ſum ſworn to; but ſaid that that caſe was different from the preſent, becauſe the bail below are at law liable to the full extent of their recognizance, and therefore when that is forfeited the Court may refuſe to relieve them unleſs they will do ſubſtantial juſtice by paying the ſum

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(*a*) Cowp. 71.

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ſum really due. But it is otherwiſe in the caſe of bail in the action, who are not liable beyond the ſum ſworn to and the coſts (*a*). The ſheriff ſtands in a more favourable ſituation than the bail, becauſe he is not a free agent as they are. And he alſo referred to *Yea* v. *Lethbridge* (*b*) to ſhew that the ſheriff is not liable to the ſame extent in an action as the bail would have been if properly taken. There is leſs reaſon too in this caſe for the Court to take advantage of the attachment againſt the ſheriff; becauſe that mode of proceeding has only obtained in modern times in lieu of the ancient method by amercement to compel him to bring in the body, which was never carried to the extent of making the ſheriff anſwerable for the debt (*c*).

Marryatt ſhewed cauſe in the firſt inſtance, and relied upon ſeveral authorities; *Orton* v. *Vincent* (*d*), *Fowles* v. *Mackintoſh* (*e*), where this very point was decided againſt the ſheriff in *C. B.*; and *R.* v. The Sheriff of *Middleſex* (*f*). He alſo ſuggeſted, as an additional reaſon why the ſheriff ſhould not be liable, that by his default the plaintiff was prevented from recovering his debt and coſts in the original cauſe, and therefore the ſheriff ought to indemnify him to the full extent.

This matter ſtood over by the deſire of the Court till this day; when

Lord KENYON, Ch. J. ſaid that the Court had been furniſhed with a precedent in point in this court; and his Lordſhip read the following caſe from the Maſter's notes.—"The King *v.* The Sheriff of *Middleſex*. An attachment having gone againſt the ſheriff, a rule was obtained calling on the plaintiff in the original action to ſhew cauſe why on payment of the ſum ſworn to and coſts the attachment ſhould not be ſet aſide, the ſame as in the caſe of bail. Lord *Mansfield* aſked Maſter *Benton* if he had ever known an inſtance of this kind, who informed the Court that he never had, unleſs where the ſheriff paid *the whole debt*; and that the orders from their Lordſhips' chambers were always on payment of debt and coſts, whereupon the rule was diſcharged."

(*a*) *Jackſon* v. *Haſſel, Dougl.* 329.

(*b*) *Ante*, 4 vol. 433. Sed vi. *Concanen* v. *Lethbridge*, 2 *H. Blac.* 36.

(*c*) 2 *H. Blac.* 434. *n.* and the caſes there cited.

(*d*) *Cowp.* 71.

(*e*) 1 *H. Blac.* 233.

(*f*) *Ib.* 543.

GROSE, J. There is no hardſhip on the ſheriff in this caſe; becauſe he has put himſelf in this ſituation by his own default in neglecting his duty.

LAWRENCE, J. Even if there had been no decided caſe, I ſhould have thought the ſheriff liable in this caſe upon the principle laid down in *Orton* v. *Vincent*. For if the bail below would be liable beyond the debt ſworn to within the extent of their recognizance, the ſheriff by whoſe default the plaintiff has been deprived of that ſecurity ought to be liable to the ſame extent as if he had done his duty.

Rule diſcharged.

Wedneſday, July 5th.

BURSTALL *againſt* HORNER.

The defendants in ſeveral actions on a policy of inſurance paid money into Court, which the plaintiff took out without taxing the coſts at that time; afterwards they entered into the common conſolidation rule; and the plaintiff was nonſuited in the action that was tried;—Held that the latter was not entitled to the coſts in any of the actions up to the time of paying money into court.

THIS was one of twelve actions on a policy of inſurance. The ſeveral defendants obtained rules for leave to pay money into court on one count in the declaration, for money had and received, (being a return of the premium,) which the plaintiffs' attornies took out of court in all the actions, but they did not then tax the plaintiffs' coſts in either of them. Afterwards the conſolidation rule was obtained, expreſſing in the uſual language, "Upon the ſubmiſſion of the defendants in the twelve actions to be bound by ſuch verdict as ſhall be found in the firſt mentioned action &c." The plaintiff was nonſuited in the cauſe that was tried; and the Maſter in his taxation of coſts allowed coſts to the plaintiff in all the actions up to the time when the money was paid into court.

Bayley obtained a rule, calling on the plaintiff to ſhew cauſe why the Maſter ſhould not be directed to review his taxation, on the ground that though he had taken the money out of court, yet as he had conſented to the conſolidation rule he was not now entitled to the coſts in any of the actions up to the time of paying money into court, he having been nonſuited in the one that was tried (*a*).

Wood, who now ſhewed cauſe againſt that rule, admitted that the plaintiff was not entitled to the coſts in the action that

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(*a*) Vid. *Stodhart* v. *Johnſon*, *ante*, 3 vol. 657; *Stevenſon* v. *Yorke*, *ante*, 4 vol. 10; and *Kabell* v. *Hudſon*. *Ib.*

Burstall *againſt* **Horner.**

was tried, but contended that he was entitled to the coſts in the reſt up to the time of paying money into court, the conſolidation rule only expreſſing that *the defendants* agreed to be bound &c. He alſo ſaid that the plaintiff would not have entered into the conſolidation rule if he had thought that it would have deprived him of the coſts to which he would otherwiſe have been entitled. But

The Court thought that according to the fair conſtruction of the conſolidation rule the plaintiff was bound as well as the defendants; and that as the nonſuit in the action that was tried was concluſive in all the other actions the plaintiff was not entitled to the coſts in any of them even up to the time when the money was paid into court.

Rule abſolute.

The King *againſt* The Inhabitants of Seton.

Wedneſday, July 5th.

The Court qnaſhed a certiorari, which was iſſued before, but not ſerved until after, judgment on an indictment for a miſdemeanor. After judgment the record can only be removed by a writ of error.

THE defendants, the inhabitants of the townſhip of *Seton*, were indicted for not repairing a road; and after verdict and judgment at the Quarter Seſſions a certiorari was *ſerved* to remove the record here.

Chambre on a former day in this term moved to quaſh the certiorari quia improvidè emanavit, obſerving that the party who now wiſhed to remove the record could only do ſo by writ of error.

Law now ſhewed cauſe againſt that rule, and inſiſted that all the proceedings below were ſtayed by the *iſſuing* of the certiorari, which was before verdict in this caſe. In 2 Ld. *Raym.* 1305. *Powell*, J. ſaid "A writ of certiorari removes any order or conviction, though they be made or taken after the teſtè of the writ, ſo they be taken before the return;" and in that caſe the inquiſition taken after the teſtè but before the return of the certiorari was quaſhed by this Court for defects appearing on the inquiſition.

Lord Kenyon, Ch. J. In the caſe of ſummary proceedings, orders and convictions before magiſtrates, the proceedings may be removed by certiorari after judgment, becauſe ſuch proceedings can only be removed by certiorari: but where a judgment has been given on an indictment, the record muſt be removed by

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writ of error. If any fraud or miſconduct had been imputed to the magiſtrates in proceeding notwithſtanding the iſſuing of the certiorari, that might have been a ground for a criminal proceeding againſt them; and I believe there are inſtances in which a criminal information has been granted againſt magiſtrates acting in Seſſions. In this caſe if the party, who ſued out the certiorari, wiſh to object to the proceedings, he muſt remove the record by writ of error: but this writ muſt be quaſhed.

Per Curiam, Rule abſolute.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

NORTON *againſt* BUTLER DANVERS.

Friday, Nov. 10th.

If a defendant, on being informed that a bailable writ has been iſſued againſt him, voluntarily give a bail bond, he cannot afterwards object to the inſufficiency of the affidavit to hold to bail.

By the ſtat. 37 *Geo.* 3. *c.* 45. for reſtraining for a limited time payments of caſh by the Bank, it is enacted that no perſon ſhall be holden to bail unleſs the affidavit made for that purpoſe contain not only every thing required by the ſtat. 12 *Geo.* 1. *c.* 29. but alſo ſtate "that no offer has been made to pay the ſum of money ſworn to in notes of the ſaid Governor and Company," &c. This act not having been adverted to, many applications were made to the Court in this term to diſcharge defendants out of cuſtody on filing common bail who had been arreſted ſince the paſſing of the act, on a defect in the affidavits in not ſtating that no offer had been made by the reſpective defendants to pay the debt in Bank notes. It being a queſtion of great importance the Court did not decide it at firſt, but on a ſubſequent day in this term they thought themſelves bound by the poſitive words of the act, and made moſt of the rules abſolute for diſcharging the defendants out of cuſtody or for ſetting aſide the bail-bonds, but without coſts.

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NORTON *againſt* DANVERS.

Before the general queſtion was determined this caſe aroſe, and *Mingay*, for the plaintiff, in ſhewing cauſe againſt the rule for delivering up the bail-bond to be cancelled, relied on the defendant's having waved all objections to the bail-bond; 1ſt, Becauſe he had not objected in laſt *Trinity* term; and 2dly, Becauſe he had voluntarily given the bail-bond; the fact being that on the defendant's being informed that a writ had been taken out againſt him on the 27th of *June* laſt he gave the bail-bond.

Wigley, in ſupport of the rule, contended, 1ſt, That the defendant had not waved his right to take advantage of the objection, either on account of the time (*a*) that had elapſed ſince the bail-bond was given, it having been given only a few days before the end of the laſt term; or on account of his having voluntarily given the bail-bond, that having been given merely to prevent the arreſt. 2dly, That this was a defect in the proceedings themſelves which the defendant could not wave, and not ſimply an irregularity in the mode or time of proceeding. *Huſſey* v. *Wilſon*, *ante*, 5 vol. 254. (*b*)

Lord KENYON, Ch. J. If any error appeared on the proceedings of the Court, I admit that the defendant could not wave without giving a releaſe of errors; and it has been doubted how far an error in law can be confeſſed: but the affidavit to hold to bail is only proceſs to bring the party in, and if he chooſe to wave any objection to that, he may do it; and in this caſe I think he has waved taking advantage of this objection. If indeed the defendant had been actually under arreſt at the time, his conſent to give a bail-bond would not have been binding on him, becauſe it might be conſidered as given under dureſs: but here he voluntarily gave this bail-bond; and on that ground only my opinion is founded.

Per curiam, Rule diſcharged (*c*).

(*a*) The length of time was afterwards holden, in *Fenwick* v. *Hunt*, to be no waver of the objection. But in a ſubſequent caſe, *Levy* v. *Daponte*, it was ruled that the defendant could not take advantage of the objection after he had pleaded.

(*b*) In that caſe there was an objection to the *writ* as well as to the affidavit.

(*c*) It became a queſtion in a ſubſequent caſe in this term, *Neſbitt* v. *Pym*, whether or not it was neceſſary to be ſtated in an affidavit *made in Ireland* for the purpoſe of arreſting the defendant in this country that the defendant had not made a tender of the money in Bank notes. For the plaintiff it was argued that this act of parliament did not extend to *Ireland*: but *The Court* were of opinion that as the affidavit, though made in *Ireland*, was made for the purpoſe of being uſed in this country, it ought to contain all thoſe requiſites that are eſſential in an affidavit made in *England* to hold to bail; and they made the rule abſolute to diſcharge the defendant out of cuſtody on filing common bail.

Mingay in ſupport of the rule. *Erſkine* and *Eſpinaſſe* againſt it.

The KING *againſt* The Inhabitants of the Weſt Riding of YORKSHIRE.

Saturday, Nov. 12th.

Juſtices of the peace at the Quarter Seſſions have no authority to order the coſts of a proſecution for a miſdemeanor, carried on under the direction of magiſtrates, to be allowed out of the county rates.

THE following order, made at the Quarter Seſſions for the Weſt Riding of *Yorkſhire*, was returned to this Court by certiorari. "Mr. *John Skelton* attorney at law having produced to the Court his bill for the coſts charges and expences incurred in the proſecution of a certain bill of indictment againſt one *G. Chapman* for a miſdemeanor in refuſing to aid and aſſiſt *R. Scholefield* conſtable of the townſhip of *Laughton en le Morthen* in the ſaid Riding in the execution of a warrant made and directed to the ſaid *R. Scholefield* by *M. A. Taylor* eſq. one of his majeſty's juſtices of the peace for the ſaid Riding againſt one *J. Parnell* for a breach of the peace, which ſaid bill of indictment was preferred and found at the General Quarter Seſſions for the ſaid Riding, and afterwards removed into the Court of King's Bench at the inſtance of the defendant and tried at *York*; and it appearing to the Court that the ſaid proſecution, after the ſame had been commenced, was directed by *Bacon Frant Bryan Cooke* and *James Stoven* three of his majeſty's juſtices of the peace for the ſaid Riding to be carried on at the expence of the ſaid Riding to be defrayed by and out of the county rates of the ſame Riding, which three laſt mentioned juſtices upon enquiry and examination into the circumſtances of the caſe were of opinion that the expence of the ſaid proſecution ought to be paid out of the ſaid rates, and that the ſaid indictment had been proſecuted accordingly by the ſaid *John Skelton* as attorney or ſolicitor in that behalf, and that the charges contained in the ſaid bill amounting in the whole to the ſum of 76*l.* 19*s.* 9*d.* are proper and reaſonable; it is therefore ordered by the Court upon the application of the ſaid *John Skelton* in that behalf that the ſaid bill be allowed, and that the treaſurer for the ſaid Riding do accordingly pay the ſame out of the rates in his hands."

A rule having been obtained, calling on the proſecutor to ſhew cauſe why the order ſhould not be quaſhed,

Law, *Chambre*, and *Lambe*, were now to have ſhewn cauſe againſt it: but, on a queſtion from the Court whether they thought it could be ſupported on any legal grounds, they candidly admitted that it could not, this not being included under the

provisions

The KING *againſt* The Inhabitants of The WEST RIDING of YORKSHIRE.

proviſions of any of the acts of parliament (*a*) giving the juſtices authority to allow charges, &c. Whereupon

The Court directed that the order of Seſſions ſhould be quaſhed.

Erſkine, *Gibbs*, *Gally*, and *Heywood*, were in ſupport of the rule.

(*a*) Vid. *Burn's Juſt.* tit. "*County-rate*," where all theſe acts are collected.

Tueſday, Nov. 14th.

ATKINSON and Others Aſſignees of HODGES a Bankrupt *againſt* ELLIOTT and another.

A. firſt purchaſed one and afterwards another parcel of goods of *B.* each at ſix months credit; when the firſt ſum became due *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, *B.* engaging to return to *A.* the overplus when the bill ſhould be paid: *B.* received the amount of the bill, and then *A* became a bankrupt, not having paid for the ſecond parcel of goods: held, in an action brought by *A.*'s aſſignees for the ſurplus of the bill, that *B.* might retain it to ſatisfy his demand on *A.* for the ſecond parcel of goods.

ON the trial of this action of aſſumpſit for money had and received, the following caſe was reſerved for the opinion of this Court.

On the 2d *May* 1796 the defendants ſold to *Hodges* the bankrupt 300 barrels of tar for 430 *l.* at ſix months credit, and on the 3d of the ſame month they drew a bill on him at ſix months date for the amount, which *Hodges* accepted. On the 2d *September* 1796 *Hodges* alſo purchaſed at ſix months credit of the defendants 200 barrels of tar for 230 *l.*, for which he gave the defendants his acceptance to their draft dated 6th *September* 1796 at ſix months date. The firſt mentioned bill for 430 *l.* became due on the 6th *November* 1796, which *Hodges* was not able to pay, but on the 9th of the ſaid month he gave the defendants a bill upon *Walpole* and Co. for 100 *l.* due the 11th of *December* following, and on the following day (*November* 10th) indorſed and gave defendants a bill of exchange drawn by him on and accepted by *Bullock* and Son, dated 27th *October* 1796, at ſix weeks after date for 500 *l.*, and the defendants gave him the following memorandum or undertaking;—"Memorandum: I promiſe to pay to Mr. "*N. Hodges* 170 *l.* when his bill on Meſſrs. *Bullock* and Son is paid, "which bill I received *November* 10th, 1796. (Signed) *Thomas* "*Elliott* and Co.—Bill dated *October* 27th at ſix weeks for 500 *l.*" It was not in the contemplation of either party to do more than take up the firſt mentioned acceptance of *Hodges* with the bill of *Bullock* and Son, and therefore after payment of what was due on that acceptance ſo given as aforeſaid for the firſt mentioned parcel of goods the reſidue was to be returned to *Hodges*.—The acceptance by Meſſrs. *Bullock* and Son for 500 *l.* became due on the

11th of *December* 1796, and was then duly paid by them to the defendants, the holders thereof; and the abovementioned bill on *Walpole* and Co. for 100 *l.* was likewiſe paid on that day. On the 13th of *December* 1796 a commiſſion of bankrupt iſſued againſt *Hodges* who was duly declared a bankrupt, and the plaintiffs were choſen aſſignees of his eſtate and effects. They immediately applied to the defendants for payment of the 170 *l.* they had been overpaid in the ſaid bill for 500*l.* on *Bullock* and Son purſuant to their undertaking above ſtated, when they objected to do it, alleging that they then held *Hodges*'s acceptance for 230 *l.* above mentioned, and claiming a right to retain the ſaid 170*l.* in part payment of the ſame, though it did not become due and payable till the 9th of *March* laſt, when the ſix months credit for the goods ſold to *Hodges* (which was their uſual credit and cuſtomary mode of dealing) expired. The action was commenced on the 12th of *February* laſt.

Reader for the plaintiffs, after ſtating the queſtion to be whether the defendants were entitled to ſet off the bankrupt's acceptance, or rather to retain the 170*l.* the remainder of the bill for 500 *l.* towards ſatisfaction of their demand on the bankrupt for 230*l.* the price of the goods ſold by them to him on the 2d of *September* 1796, argued in the negative. This queſtion depends on the contract between the parties made on the 10th of *November* 1796. Now the depoſit of the bill for 500 *l.* with the defendants on that day was not a general depoſit to anſwer all demands that they might have on the bankrupt, but for the ſpecific purpoſe of ſecuring to them the 230*l.*, the remainder of the value of the firſt goods ſold by them to the bankrupt; and by that memorandum the defendants expreſsly agreed to return the overplus of 170 *l.* to the bankrupt as ſoon as the bill for 500 *l.* was paid. The attempt therefore on the part of the aſſignees to retain this in ſatiſfaction of another debt is in direct oppoſition to their agreement; it being ſtated as a fact in the caſe that nothing more was in the contemplation of the parties, when the bill for 500*l.* was depoſited with the defendants, than to ſecure to them the amount of the bankrupt's firſt acceptance for the firſt parcel of the goods. As between the original parties to this contract it is clear that the defendants could not have had any lien on the bill for 500*l.* for any other demand than that expreſſed in the memorandum; and the bankruptcy of *Hodges* cannot put the defendants in a better ſituation than they were in before. It will be contended however

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on behalf of the defendants that it is immaterial by what means they got this money into their hands, but that having got it they are entitled to ſet off their ſecond demand againſt it by virtue of the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 28. (*a*). And it cannot be denied but that ſome debts may be ſet off under this ſtatute that were not due at the time of the bankruptcy on the ground of there being mutual credit between the parties; as in the caſes *Ex parte Preſcott*, 1 *Atk.* 230.; *French* v. *Fenn*, *Tr.* 23 *Geo.* 3. *B. R.*; and *Smith* v. *Hodgſon*, *ante* 4 vol. 211. But on examination it will be found that this caſe does not come within the meaning of the ſtatute reſpecting "mutual credit;" for that only applies to caſes where mutual credit has been given in the ordinary courſe of commercial tranſactions: whereas this is not a caſe of that deſcription, the bill for 500*l.* having only been depoſited with the defendants for a particular purpoſe. The property in that bill was never in the defendants for a ſingle moment; they held it merely as truſtees for the bankrupt. But even if this were a caſe of mutual credit, the defendants are not entitled to retain the overplus of 170*l.* by reaſon of their expreſs ſtipulation. Suppoſe the defendants had undertaken to pay this ſurplus to a third perſon inſtead of the bankrupt, there would have been no pretence to ſay that they could have retained it on the ground of their having another demand on the bankrupt; and if not, they cannot retain it as againſt the aſſignees of the bankrupt.

Gally, contrà, was ſtopped by the Court.

Lord KENYON, Ch. J. The ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 28. enacts, that where there are either *mutual credit or mutual debts* between the bankrupt and any other perſon, one debt may be ſet off againſt another, and only the balance claimed. Now in uſing thoſe words the Legiſlature muſt have intended ſomething more than would have been expreſſed by "mutual debts" only; and the deciſions referred to ſhew that this conſtruction has been put upon this act. I agree to what was ſaid by Mr. J. *Buller* in one of the caſes that where there is a truſt between both parties there is a mutual credit. Juſtice alſo requires that the whole account on both ſides

ſhould

(*a*) Which enacts, that where it ſhall appear to the commiſſioners that there hath been mutual credit given by the bankrupt and any other perſon, or mutual debts between the bankrupt and any other perſon, at any time before ſuch perſon became bankrupt, the ſaid commiſſioners, &c. ſhall ſtate the accout between them, and one debt may be ſet againſt another; and what ſhall appear to be due on either ſide, on the balance of ſuch account, and on ſetting ſuch debts againſt one another, and no more, ſhall be claimed or paid on either ſide reſpectively.

ſhould be ſtated; and that the balance ſhould be the only thing to conſtitute the debt. In my opinion the caſe *Ex parte Preſcott* was properly decided; and that has ſince been followed by a ſeries of determinations.

GROSE J. It has been objected that the defendants cannot ſet off the 170*l.* becauſe it is contrary to their expreſs agreement: but conſider that the bankrupt by his agreement was bound to pay his acceptance for 230*l.* at a future day, but that his bankruptcy diſabled him; that was a credit on one ſide; and credit was conſtituted on the other by giving a bill which became due at a ſubſequent time. It is clearly therefore a caſe of mutual credit, and it is juſt that one demand ſhould be ſet off againſt the other.

LAWRENCE J. This is directly within the authority of the caſe *Ex parte Preſcott*.

Per Curiam Poſtea to the defendants.

COOK *againſt* JENNINGS.

Tueſday, Nov. 15th.

In an action of covenant in a charter party of affreightment, in which the defendant covenanted to pay ſo much for freight for "goods "delivered "at *A.*" freight cannot be recovered pro ratâ itineris if the ſhip be wrecked at *B.* before her arrival at *A.*, though the defendant accept his goods at *B.*

THIS was an action of covenant on a charter-party of affreightment, dated 2d *Auguſt* 1796, by which the plaintiff let the ſhip *The Reſolution* to the defendant to freight from *Liverpool* to *Wyburgh* and back to *Liverpool*, and agreed that the maſter ſhould take on board a cargo of ſalt to *Wyburgh*, and after delivering the ſame there ſhould take on board there a cargo of deals, in conſideration of which the defendant agreed to pay to the plaintiff "in "full for the freight and hire of the ſhip for the ſaid voyage at "and after the rate of 7*l.* per ſtandard hundred for deals *de*"*livered at Liverpool*, &c; the freight to be paid one fourth in "caſh on her arrival and the remainder by an acceptance on "*London* at 4 months date." The declaration after ſetting forth the charter-party ſtated that the ſhip after carrying the cargo of ſalt to *Wyburgh* took on board there a cargo of deals, &c. and proceeded on her voyage for and towards *Liverpool*, &c. and whilſt the ſhip was ſo proceeding, &c. and after ſhe had performed a great part of her voyage, but before her arrival at *Liverpool* on &c. the ſhip was by the force and violence of the winds and waves &c. wrecked and caſt upon the ſhore, and thereby became incapable of proceeding any farther on the voyage, by reaſon whereof the cargo of deals was obliged to be put on ſhore for the preſervation thereof; "which ſaid cargo ſo unladen the defendant on

1797.

Cook *againſt* Jennings.

&c. accepted and received into his hands and poſſeſſion, and then and there ſold and diſpoſed of the ſame to his own uſe, whereby he became liable to pay to the plaintiff a proportionable part of the ſaid freight and hire of the ſhip for the carriage of the ſaid cargo of deals for ſuch part of the voyage from *Wyburgh* to *Liverpool* as the ſhip performed," &c.; with an averment that a proportionable part amounted to the ſum of 800 *l.* And the breach aſſigned was in the non-payment of that ſum.

The defendant pleaded that no part of the cargo of deals was delivered at *Liverpool* according to the form and effect of the ſaid charter-party.

To this plea there was a ſpecial demurrer, aſſigning theſe cauſes, that the defendant had not by his plea confeſſed and avoided or denied the matter alleged in the declaration, or ſufficiently anſwered the ſame, but attempted to put in iſſue collateral matters immaterial to the defence of the action; and that no material iſſue could be taken upon the plea.

Wood in ſupport of the demurrer. The matter diſcloſed in the plea is no anſwer to the declaration. It does not follow, becauſe the plaintiff is not entitled to the whole ſum ſtipulated to be paid on the delivery of the goods at *Liverpool*, that therefore he is not entitled to recover any thing. But according to the caſe of *Luke* v. *Lyde* (*a*) he is entitled to a proportionable part of the freight. And though there the plaintiff declared on an indebitatus aſſumpſit (*b*), yet the principle on which that caſe was decided is equally applicable to the preſent. And whether the contract be or be not under ſeal is immaterial in this reſpect; for the law equally operates on the ſubject-matter in both caſes, and ſays that the party is entitled to freight pro ratâ itineris. The voyage here was put an end to by the act of God without any default in the maſter; the freighter has received a benefit from that part of the voyage which was performed; in conſcience therefore he is bound to pay pro ratâ; and he has aſſented to the delivery at the place where the ſhip was wrecked by his acceptance of the goods there.

Barrow, contrà. The delivery of the cargo at *Liverpool* was a condition precedent to the plaintiff's right to recover any part of the freight, the defendant having expreſsly engaged to pay only in one event that has not happened, the ſafe delivery of the goods at

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(*a*) 2 *Burr.* 882; and 1 *Bl. Rep.* 90.

(*b*) This does not appear in the report, but it was ſo admitted now.

at *Liverpool*; the words of the agreement are "for the freight at the rate of 7*l.* per ſtandard hundred *for deals delivered at Liverpool.*" The plaintiff ſhould have averred in his declaration a delivery of the goods at *Liverpool* in order to ſhew the defendant's liability to pay the freight. It is however ſuppoſed that the averment in this declaration, that in conſequence of the ſhip's having been wrecked "the defendant accepted and received the cargo and ſold and diſpoſed of the ſame to his own uſe," operates as an implied waver of that part of the contract. But, in the firſt place, a contract under ſeal cannot be waved by a parol agreement, *Littler* v. *Holland*, *ante*, 3 vol. 590; and in the next place if the plaintiff had intended to rely on a waver of this contract, he ſhould have expreſsly averred that it was waved. On theſe grounds therefore 1ſt, That the delivery of the goods at *Liverpool* was a condition precedent to the plaintiff's right to recover any freight at all; 2dly, That a contract under ſeal cannot be deſtroyed or waved by a parol contract; and 3dly, That, if it can, an expreſs waver ought to have been here alleged; the plaintiff is not entitled to recover even a proportionable part of the freight.

Wood in reply. It may be admitted, where a party ſues for freight on a charter-party of affreightment, that he muſt allege either a performance of the voyage or a ſufficient and ſubſtantial reaſon for it's non-performance: but here a ſufficient reaſon, namely the act of God, is ſhewn why the whole voyage could not be performed. If the defendant had not accepted the goods, perhaps he would not have been liable to pay any part of the freight: but by his acceptance of them he has agreed to pay a proportionable part, and this not on the ground of a parol waver of a contract under ſeal, (and therefore the caſe of *Littler* v. *Holland* does not apply,) but by the operation of law on a contract ſo framed. If the objection, that becauſe the voyage was not performed the defendant was not liable to pay any part of the freight, can prevail, it ought equally to have prevailed in *Luke* v. *Lyde*; for the form of the inſtrument on which the queſtion ariſes cannot vary the defendant's liability.

Lord Kenyon Ch. J. We are called upon to decide in this action according to the rules of law on a contract between theſe parties, which was made in the moſt ſolemn manner by a deed under ſeal; though indeed I do not know that it would have made any difference if the queſtion had ariſen on a preciſe formal contract not under ſeal. By the terms of this agreement the defendant engaged to pay ſo much on delivery of the goods at *Liverpool*, "one-fourth in caſh on her arrival, and the remainder by an acceptance at four months:" but the goods never arrived; then at what time were thoſe bills to be dated? We do not ſit here to make, but to enforce, contracts; and the queſtion put to us is, whether the freight is to be paid under this contract, though the ſhip never arrived, but was loſt before her arrival, at *Liverpool?* upon which I cannot bring my mind to doubt. The caſe of *Luke* v. *Lyde* is very diſtinguiſhable from the preſent, that being the caſe of a general aſſumpſit for the freight of goods, in which Lord *Mansfield* ſtates the marine law on this ſubject. But what has the caſe of an implied contract to do with an expreſs contract? Lord *Coke* ſays expreſſum facit ceſſare tacitum. Here the parties are bound by a preciſe agreement. Then it is ſuggeſted that we ought not to give effect to this contract becauſe it is unreaſonable: but we are to decide according to the contract of the parties; and the law ſays that if *A.* covenant to enfeoff *B.*, *A.* is not releaſed from his covenant though *B.* will not accept livery of ſeiſin, unleſs the act be fruſtrated by the act of the covenantee. It is not neceſſary now to determine whether or not the plaintiff might not have brought an action of aſſumpſit; it will be time enough to decide that caſe whenever the queſtion ariſes. But here the queſtion is whether or not he can enforce payment of the money under this contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*; in anſwer to this action the defendant has a right to ſay non hæc in fœdera veni.

ASHHURST J. Though the objection made by the defendant is a technical one and does not meet the juſtice of the caſe, we are bound to pronounce judgment on the contract that the parties have made. And I think that the defendant is not bound to pay the freight under this agreement, the event on the happening of which the money was to become due never having taken place.

GROSE J. This being an action of covenant it is neceſſary for the plaintiff to ſhew that he is entitled by the defendant's covenant to that which he ſeeks. Now it is to be obſerved that the defendant only covenanted to pay ſo much per hundred "for deals delivered at *Liverpool*;" and unleſs the goods were delivered there the defendant did not undertake to pay any thing. But it is admitted on the record that the deals never were delivered at *Liverpool*, and therefore the caſe does not come within the covenant.

I had

COOK *againſt* JENNINGS.

I had ſeen the caſe of *Luke* v. *Lyde* before I came into court, but could not aſcertain from the report of it what was the form of the action: it is now admitted that that was aſſumpſit generally; and though there is no difference in the conſtruction of a contract whether it be or be not by deed provided the terms are preciſely and exactly defined, yet that caſe is not in point, becauſe it was on an implied aſſumpſit, where much is frequently implied in order to arrive at the juſtice of the caſe. But there is a caſe in point in 1 *Brownl.* 21., *Bright* v. *Cowper.* It was "an action of covenant on a covenant made by the merchant with the maſter of a ſhip that if he would bring his freight to ſuch a port then he would pay him ſuch a ſum, and ſhews that part of the goods was taken away by pirates, and that the reſidue of the goods was brought to the place appointed and there unladen, and that the merchant had not paid, and ſo the covenant broken; and the queſtion was, whether the merchant ſhould pay the money agreed for, ſince all the merchandizes were not brought to the place appointed (*a*)? and the Court was of opinion that he ought not to pay the money becauſe the agreement was not by him performed." Now that is a direct authority againſt the plaintiff in this caſe.

LAWRENCE J. I agree with the plaintiff's counſel that whether the contract be by parol or under ſeal the operation of the law on it is equally the ſame. When a ſhip is driven on ſhore it is the duty of the maſter either to repair his ſhip or to procure another, and having performed the voyage he is then entitled to his freight: but he is not entitled to the whole freight unleſs he perform the whole voyage except in caſes where the owner of the goods prevents him; nor is he entitled pro ratâ unleſs under a new agreement. Perhaps the ſubſequent receipt of theſe goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has reſorted to the original agreement, under which the defendant only engaged to pay in the event of the ſhip's arrival at *Liverpool.* That event has not happened, and therefore the plaintiff cannot recover in this form of action.

Judgment for the defendant.

(*a*) See alſo *Clarke* v. *Gurnell*, 1 *Bulſtr.* 167.

Tueſday, Nov. 14th.

DOE on the ſeveral Demiſes of JOHN BARNETT and MARY his Wife and THOMAS MARRIOTT *againſt* SARAH KEEN an Infant by PHILIP ACOCK her Guardian.

A. died ſeiſed, leaving two infant daughters by different venters; held that an entry generally by the mother of the youngeſt daughter as her guardian in ſocage conſtituted a ſufficient ſeiſin in the eldeſt infant daughter to carry the deſcent of her moiety on her death to her heirs.

EJECTMENT for one undivided moiety of three meſſuages and land in the pariſh of *Wandſworth* in the county of *Surry*; At the trial of which at the laſt aſſizes for that county before *Buller* J. a verdict was taken for the plaintiff, ſubject to the opinion of this Court upon the following caſe. *William Keen*, being ſeiſed in fee of the whole of the premiſes, died inteſtate on the 29th *July* 1785, leaving two daughters by different venters, *viz. Elizabeth*, and *Sarah Keen*. The defendant on the death of the inteſtate (the defendant's mother) as her guardian in ſocage, entered upon the premiſes and received the profits until the 7th *October* 1796, when ſhe died. *Elizabeth Keen* died on the 29th *March* (*a*) 1787, unmarried and inteſtate, and *Mary* the wife of *John Barnett* and *Thomas Marriott* the leſſors of the plaintiff are her heirs at law.

C. Moore for the leſſors of the plaintiff, after ſtating the queſtion to be whether there was a ſeiſin in the daughter *Elizabeth*, under whom the leſſors of the plaintiff claim, ſo as to warrant their entry into her moiety as heirs at law to her? contended in the affirmative. 1ſt, The entry of the mother as guardian in ſocage of the defendant, and her receipt of the profits, amount to a ſufficient ſeiſin for her daughter; and 2dly, The ſeiſin of one coparcener is a ſeiſin for the other. 1ſt, The firſt point is ſufficiently eſtabliſhed by the caſe of *Goodtitle* d. *Newman* v. *Newman* (*b*). Secondly, From the relation of coparceners the entry of one is in law the entry of the other. *Lit. ſ.* 396. Where two claim by the ſame title, as two ſons from their father, and the youngeſt ſon enters, the law will preſume that his entry was not to gain a poſſeſſion diſtinct from his elder brother, but merely to preſerve the eſtate from a ſtranger; and therefore though the younger ſon dies ſeiſed and his iſſue enters by deſcent, yet the entry of the elder brother or his heir is not therefore taken away; and the reaſon given in *Gilb. Ten.* 28. is that this

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(*a*) It was admitted at the bar to queſtions put by the Court, though not ſtated in the caſe, that *Elizabeth* died under age; and that the mother of the defendant occupied the premiſes herſelf.

(*b*) 3 *Wilſ.* 516.

being the moſt charitable conſtruction which can be put upon the younger brother's act, and by which alone it can be juſt and right, the law ſhall ſo intend it. Now if the law put ſo favourable an interpretation in that caſe where the younger ſon cannot have any claim for himſelf, à fortiori ſuch a preſumption ſhall be made in the caſe of coparceners, who together make but one heir and have equal claims. And ſo it is ſtated in *Co. Lit.* 243. *b.* "that where one coparcener enters generally and takes the profits, this ſhall be accounted in law the entry of both, and no diveſting of the moiety of her ſiſter." So is *Gilb. Ten.* 29.; 4 *Com. Dig.* tit. *Parceners* (A. 3); and *Jenk.* 242. *pl.* 25. Now here the entry of the mother as guardian of her daughter was general, and there is nothing to ſhew that it was made excluſively for her and to ouſt her half ſiſter; in ſuch a caſe therefore the law preſumes that the entry was for the rightful heirs. *Hob.* 120. In 1 *Rol. Abr.* 740. tit. *Entry* (F), this caſe is put: "If a rent deſcend to an aunt and niece as coparceners, and the aunt have the niece in ward as guardian in ſocage, and receive the rent to her own uſe, and never claim to the uſe of the niece, yet this ſeiſin of the aunt ſhall be an actual ſeiſin for the niece; for in law the general ſeiſin of one is for both; and here is not any expreſs act that her entry was to her own uſe." So *Co. Lit.* 15. *a.* conſiders an entry by a guardian as creating a ſufficient ſeiſin to maintain a poſſeſſio fratris. It follows from all theſe authorities that the entry of the mother being general muſt be conſidered as made for thoſe lawfully entitled, and not excluſively for her daughter; that an entry by the guardian in ſocage of a coparcener veſts the ſame right in her as if ſhe had made the entry herſelf, and is attended with the ſame legal conſequences as to others; and that the entry of one coparcener generally is the ſame in law as the entry of both. The conſequence is that the eldeſt daughter *Elizabeth* died ſeiſed of a moiety, which has deſcended to the leſſors of the plaintiff as her heirs at law of the whole blood.

Beſt for the defendant. The principle on which the half blood are excluded being, as Mr. Juſtice *Blackſtone* (*a*) expreſſes it, purely a principle of evidence to preſerve as far as it probably may the deſcent of the eſtate in the blood of the firſt ſuppoſed feudatory or taker, the Court will take care not to extend it beyond the reaſon of that principle in caſes upon which any doubt can be raiſed whether the caſe comes within the rule of deſcent. The extenſion

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(*a*) 2 *Black. Com.* 228.

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extenſion of the rule to this particular caſe where the father was the firſt purchaſer will evidently work a contrary effect; for it will take the eſtate from his own blood to give it to remote relations. It muſt however be admitted that if the eldeſt ſiſter were actually ſeiſed of a moiety at her death the ſtrict rule of law muſt prevail, according to what is ſtated in the laſt mentioned author (*a*), and as appears by a caſe in the year books of *Mich.* 10 *Ed.* 3. (*b*), referred to by him; although it appears that the law was conſidered otherwiſe in *M.* 19 *Ed.* 2. (*c*). But at any rate it muſt be ſhewn that there was a ſeiſin *in fact* in the eldeſt daughter; a mere ſeiſin in law is not ſufficient. This was admitted in the caſe of *Goodtitle* v. *Newman* (*d*): and the difference between the two ſorts of ſeiſin was taken in *Dally* v. *King* (*e*). Mr. Juſtice *Blackſtone* (*f*) mentions what ſhall be conſidered as an actual ſeiſin either by the party's own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or by receiving rent from a leſſee of the freehold (*g*); and he gives the reaſon for this, becauſe the law requires the ſame notoriety of poſſeſſion now as evidence that the anceſtor had the property in himſelf which formerly took place when the ceremony of actual inveſtiture in the lords' court was performed. Then comparing that with the facts found in this caſe, there does not appear to have been a ſufficient ſeiſin in fact by any of the means there pointed out. To try this caſe by the mode of proof which commonly prevails in deriving a deſcent: it is only neceſſary in general to prove the claimant heir to the perſon laſt ſeiſed. But it is clear that the leſſors proving themſelves heirs to *Elizabeth* in this caſe would not have been ſufficient without ſhewing further the connexion between her and the defendant's mother who was actually in poſſeſſion. This amounts therefore at moſt only to a ſeiſin in law, which is not ſufficient to bar the half-blood. And this anſwer may be given to the general current of authorities cited on the other ſide: they only prove that the ſeiſin of one coparcener is in law the ſeiſin of the other; and this may as againſt ſtrangers have the operation of a ſeiſin in fact, either to prevent a vacant poſſeſſion or the operation of the ſtatute of Limitations. But it does not follow that it would be the ſame as between themſelves. Mr. Juſtice *Blackſtone*

(*a*) 2 *Black. Com.* 231.

(*b*) 10 *Aſſ.* 27.

(*c*) *Mayn. Ed.* 2. 628. and *Fitzh. Abr.* tit. *Quare Impedit* 177.

(*d*) 3 *Wilſ.* 516.

(*e*) 1 *H. Blac.* 1.

(*f*) 2 *Black. Com.* 209.

(*g*) *Vid. poſt.* 390.

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ſtone (*a*) ſays that the entry of one ſhall in *ſome* caſes enure as the entry of all; which implies that it is not in *all* caſes. Lord *Coke* (*b*) ſays that "parceners have one entire freehold in the land as long as it remains undivided in reſpect of ſtrangers: but between themſelves to many purpoſes they have in judgment of law ſeveral freeholds;" and they are not ſeiſed (*c*) per my et per tout like joint-tenants. A caſe is put in *Co. Lit.* 364. *b.* 188. *a.* "where two coparceners are diſſeiſed, and a deſcent is caſt, and they have iſſue and die; if the iſſue of one recover her moiety the other ſhall not enter with her, becauſe their remedies are ſeveral, the one having a right of entry, the other only a right of action; though when both recover they are coparceners again. This ſhews that the entry of one is not neceſſarily the entry of both. In the Earl of *Suſſex* v. *Temple* (*d*) Lord *Holt* ſays that the poſſeſſion of one joint-tenant being the poſſeſſion of the other does not hold place againſt the ſtatute of Limitations; which can only mean that the entry of one ſhall not be conſidered as the actual entry of the other, but merely as giving a right of entry to the other if exerciſed within time. And *Aſton* J. in *Fiſher* v. *Proſſer* (*e*) ſaid that he conſidered that the only caſe where the poſſeſſion of one tenant in common ſhall be conſidered the poſſeſſion of both is, where one holds poſſeſſion *as ſuch*, and receives the profits for *both*. The only caſe which bears againſt the defendant is that in *Hob.* 120: but that law is doubted in *Dy.* 128., and does not ſeem reconcileable with the paſſages cited from *Co. Lit.* or with Mr. J. *Aſton*'s opinion. Beſides which it is diſtinguiſhable in this reſpect, that there all the parties were of full age, and therefore they might be conſidered as aſſenting to each other's acts: whereas here the daughters were infants, and the defendant's aſſent cannot be implied againſt her own intereſt. Upon the whole there was no ſeiſin in fact by the eldeſt ſiſter, but at moſt only a ſeiſin in law; and the Court will not incline to extend the operation of the rule excluding the ſucceſſion of the half-blood beyond the ſtrict letter of it.

Lord Kenyon Ch. J. The induſtry of the counſel has furniſhed us with all the learning on this ſubject. I refer in general to the authorities cited by the plaintiff's counſel, the fair reſult from all of them being that which is drawn by him. But there is

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(*a*) 2 *Com.* 188.

(*b*) *Co. Lit.* 164. *a.*

(*c*) 1 *Bac. Abr.* 445.

(*d*) 1 *Ld. Raym.* 312.

(*e*) *Cowp.* 219.

a ſhorter point on which this caſe may be decided in favour of the plaintiff. Nothing can be clearer than that an infant may conſider whoever enters on his eſtate as entering for his uſe. And if ſo, that puts an end to the caſe at once, both theſe daughters being infants when their father died. This diſtinction was taken by Lord *Coke* (*a*), and has ſince been frequently adopted, that if the father die, his eſtate being out on a *freehold leaſe*, that is not ſuch a poſſeſſion as to induce the poſſeſſio fratris, unleſs the elder ſon live to receive rent after the expiration of ſuch leaſe: but it has been always the ſettled rule that, if the father die leaving his eſtate out on *a leaſe for years* only, the poſſeſſion of the tenant is ſo far the poſſeſſion of the elder ſon as to conſtitute the poſſeſſio fratris. Then here the inſtant the father died the mother entered, the rights of the different parties veſted without any incumbrance to prevent the immediate ſeiſin of the two parceners; the rent was due to both infants, and it might have been conſidered as received to the uſe of both even if the entry had been made by a mere ſtranger. On this ſhort ground therefore, though I think that the plaintiff's counſel alſo eſtabliſhed his poſition that the poſſeſſion of one parcener is the poſſeſſion of the other ſo as to create a ſeiſin in the other and carry her ſhare by deſcent to her heirs, I am of opinion that the plaintiff is entitled to our judgment.

Per curiam, Poſtea to the plaintiff.

(*a*) Vid. *Co. Lit.* 15. *a.*; and *Jenk.* 242.

Thurſday, Nov. 16th.

GLASSE *againſt* MOUNT.

If an agent of the grantee of an annuity actually pay the conſideration money to the grantor, that fact muſt be ſtated in the deeds granting the annuity.

THE defendant granted an annuity of 450*l.* to the plaintiff in conſideration of 3400*l.*, which though advanced by the plaintiff was in fact paid by *Bunce* as his agent, and ſo it was ſtated in the memorial. And a rule having been obtained calling on the plaintiff to ſhew cauſe why a warrant of attorney to confeſs judgment ſhould not be delivered up to be cancelled, becauſe a deed of the ſame date with the warrant of attorney and given with it to ſecure this annuity ſtated that the conſideration money was paid *by the plaintiff* (inſtead of *Bunce*) to the defendant;

Erſkine, in ſhewing cauſe againſt the rule, attempted to diſtinguiſh this caſe from thoſe of the Duke of *Bolton* v. *Williams* (*a*), and

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(*a*) 2 *Vez.* Jun. 138.; and 4 *Bro. Ch. Caſ.* 297.

and *Dalmer* v. *Barnard* (*a*), by obſerving that in thoſe caſes it was not ſtated truly *in the memorials* by whoſe hands the conſideration money was paid: whereas in this caſe it does appear on the memorial that the conſideration was paid by *Bunce* for the plaintiff; that the omiſſion of ſuch a circumſtance in the deed was of leſs importance than it would be in the memorial, becauſe the object of the Legiſlature in paſſing the annuity act was to diſcloſe the whole tranſaction; and that the public had an opportunity of conſulting the memorial and thereby knowing the real tranſaction, but that they had no means of knowing the contents of a private deed.

Lord KENYON Ch. J. (ſtopping *Gibbs* and *Bayley* in ſupport of the rule) The words of the third ſection of the annuity act require in poſitive terms that it ſhall be ſtated *in the deed* "by whom and on whoſe behalf the conſideration money was paid." Therefore this objection muſt prevail. Nor can this caſe be diſtinguiſhed on principle from the two caſes that have been referred to; the former of which was decided by Lord *Thurlow*, who at firſt doubted of the expediency of the act altogether, and afterwards on an appeal by Lord *Loughborough*, to whoſe exertions the public are indebted for this act, and who very properly obſerved that a contrary deciſion would render the act nugatory. And we have no reluctance in determining this caſe, becauſe (as was obſerved by my brother *Groſe* in *Dalmer* v. *Barnard*) if the plaintiff be diſſatisfied with our judgment he may ſtill bring his action on the deed, by which means he will have an opportunity of putting this queſtion on record.

Per Curiam, Rule abſolute (*b*).

(*a*) *Ante* 248.

(*b*) See the caſe *Ex parte Anſell*, *Boſ.* and *Pull. Rep. C. B.* 63. *n. a.* where *Eyre*, Ch. J. ſaid "The *deed* muſt expreſs by whom the conſideration was paid, but not the *memorial*."

WEBB *againſt* FOX and Another.

Friday, *Nov.* 17th.

TO trover for goods, namely, 300 yards of quilting, the defendants pleaded, firſt, not-guilty, on which iſſue was joined; and ſecondly the bankruptcy of the plaintiff before the time of

An uncertificated bankrupt has a right to goods acquired by him ſince his bankruptcy againſt all the world but his aſſignees, and may maintain trover for them againſt a ſtranger.

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the converſion ſtated in the declaration, ſetting forth particularly the trading, petitioning creditor's debt, bankruptcy, commiſſion, and the aſſignment of all the plaintiff's effects to the aſſignees, &c.

The plaintiff replied that after the aſſignment he "became and was *lawfully* poſſeſſed of the ſaid goods &c. and was and continued ſo poſſeſſed thereof without any claim interruption moleſtation or denial of the ſaid *T. R.* &c" (the aſſignees) until the defendants took the ſaid goods &c.

The defendants rejoined that the plaintiff had not obtained his certificate.—

To this rejoinder there was a general demurrer.

This caſe was twice argued, in *Trinity* term laſt by *Beſt* for the plaintiff and *Dampier* for the defendants, and now by *Erſkine* for the former and *Gibbs* for the latter.

Arguments for the plaintiff.—A perſon having a ſpecial property in goods may maintain trover for them; an uncertificated bankrupt is capable of having ſpecial property; and it appears on this record that the plaintiff has ſuch a property in the goods in queſtion. That a perſon having a ſpecial property in chattels may maintain trover for them is a point too clear to be diſputed. Special property is the mere poſſeſſion of property by one with the aſſent of the true owner: the poſſeſſor is liable over to the perſon who has the abſolute property for any damage that may be done to it, and in reſpect of that liability he may maintain trover for it. An uncertificated bankrupt may be poſſeſſed of property as againſt all the world but his aſſignees, and may maintain either treſpaſs or trover for it againſt wrong doers. If it be objected that the defendant ought not to be ſued by the plaintiff becauſe he may alſo be ſued by the aſſignees, the anſwer is that a recovery in this action may be pleaded in bar to any action brought by the aſſignees, in the ſame way as ſuch a recovery by a perſon having ſpecial property may to an action brought by the perſon having the general property againſt a wrong doer. In *Aſhley* v. *Kell* (*a*) it was holden that a bankrupt might ſell goods to a bonâ fide purchaſer: but he cannot convey a title to another unleſs he himſelf has a title. That caſe was recognized in *Chippendale* v. *Tomlinſon* (*b*) by *Buller* J. who explains what Lord *Hardwicke* meant in the caſe *Ex parte Proudfoot*, 1 *Atk.* 253. By the caſe of *Chippendale* v. *Tomlinſon* it

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(*a*) 2 *Str.* 1207.

(*b*) *Co. Bank. L.* 518.

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it appears that an uncertificated bankrupt may labour for his own benefit and recover the fruits of that labour; and if he may, it is difficult to draw the line and allow him to receive thoſe fruits up to a certain amount, and no farther: whereas the doctrine, on which the defendants rely, would exclude him from the benefit of his own induſtry altogether. The plaintiff's counſel alſo cited the caſes of *Evans* v. *Brown* (*a*), *Silk* v. *Oſborne* (*b*), *Laroche* v. *Wakeman* (*c*), and *Fowler* v. *Down* (*d*), to ſhew that an uncertificated bankrupt may maintain trover; and they obſerved that, though the three former of thoſe caſes were only deciſions at Niſi Prius, they were recognized and adopted in the latter after great conſideration by the Court of Common Pleas, where this preciſe point was determined.

Arguments for the defendants.—The action of trover is founded on property either general or ſpecial; the right of property may be ſuch as carries with it the right of poſſeſſion. There is no pretence to ſay in this caſe that the general property is in the plaintiff; it is veſted in his aſſignees. Therefore if the plaintiff can recover at all, it muſt be on a ſuppoſed analogy between this caſe and the caſes of ſpecial property: but no perſon can have a ſpecial property in any thing but with the conſent of the true owner. If the plaintiff had had the actual poſſeſſion of theſe goods, no one but the aſſignees could have claimed it: but he had parted with the poſſeſſion, and the defendants, in whoſe poſſeſſion the goods are, are anſwerable to the aſſignees. That an uncertificated bankrupt cannot have any property of his own is proved by the three ſtatutes, 1 *Jac.* 1. *c.* 15. *ſ.* 14.; 21 *Jac.* 1. *c.* 19. *ſ.* 14.; and 19 *Geo.* 2. *c.* 32. *ſ.* 1., that protect payments made by and to bankrupts after an act of bankruptcy in certain inſtances, and by the caſes *Ex parte Proudfoot* (*e*), *Martin* v. *O'Hara* (*f*), *Billon* v. *Hyde* (*g*), *Hitchin* v. *Campbell* (*h*), and *Evans* v. *Mann* (*i*); in the firſt of which it was ſaid by Lord *Hardwicke* that the future perſonal eſtate of the bankrupt is veſted in the aſſignees, and in the others it was holden that payments and a ſale by a bankrupt after the bankruptcy could not be ſupported, becauſe thoſe caſes did not come within either of theſe three ſtatutes. And in *Webb* v. *Ward* (*k*), where an uncertificated bankrupt was required to give

ſecurity

(*a*) *Eſpin. Caſ.* 3 vol. 170.
(*b*) *Ib.* 140.
(*c*) *Peake's Caſ. at N. P.* 140.
(*d*) *Boſ. & Pull. Rep. C. B.* 44.
(*e*) 1 *Atk.* 252.
(*f*) *Cowp.* 824.
(*g*) 1 *Vez.* 326.
(*h*) 2 *Bl. Rep* 827.
(*i*) *Cowp.* 569.
(*k*) Ante 296.

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ſecurity for the coſts in an action of trover brought by him, Lord *Kenyon* recognized the general principle that "an uncertificated bankrupt cannot have any property of his own." The policy of the bankrupt laws is that a bankrupt ſhall not carry on any trade before he obtains his certificate: he is put in the power of his creditors; and it depends on them whether they will conſent to his carrying on trade again. But whatever may be the caſe of a bankrupt in ſome ſituations, it does not appear on theſe pleadings that this plaintiff can ſupport his action. It is trover for goods, in which he alleged, as he was bound to do, that he was not only poſſeſſed of the goods in queſtion, but poſſeſſed of them *as of his own goods*. The plea gives an anſwer to that general title, by ſhewing that the plaintiff is incapable of having any property inaſmuch as all his effects were conveyed under the bankrupt laws to his aſſignees. To this the plaintiff replies (not that he held this property in truſt for any other perſon, for then it would not have paſſed under the aſſignment, nor that it was procured by the produce of his own labour, for then it would have fallen within the caſe of *Chippendale* v. *Tomlinſon*, nor that he held it with the permiſſion and conſent of the aſſignees, for then he would have had a ſpecial property in the goods, but) that he was *lawfully poſſeſſed* of the goods without the claim or interruption of the aſſignees, not even ſaying that they knew it. But this leaves the queſtion of property untouched: he was bound to ſhew poſſeſſion and property; the property was denied in the plea, not the poſſeſſion, and therefore he ſhould have ſhewn the property in himſelf in the replication: but he has not aſſerted his property which was denied in the plea, but merely re-aſſerted his poſſeſſion which the plea admitted. The general allegation in the replication that the plaintiff was *lawfully* poſſeſſed of theſe goods is inſufficient; he ſhould have ſhewn that he was in a ſituation to have a legal title to them. The right of a bankrupt to receive the fruits of his own labour to any extent is not diſputed by the defendants in this caſe: but as that is an excepted caſe, if it be the foundation of the plaintiff's title, he ſhould have replied that the goods in queſtion were procured by his own labour. In trover the plaintiff can only recover on the ſtrength of his own title; a declaration merely ſtating poſſeſſion in the plaintiff would have been inſufficient; and this replication, which only reſts on poſſeſſion, is equally bad, the title having been denied by the plea. Nor is this a ſingular caſe in which the plaintiff muſt recover on the

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the ſtrength of his own title without regard to the defendant's right: it is a ſufficient anſwer to be given by a defendant in an ejectment, who has no title himſelf, to ſhew a title in a third perſon or even a term outſtanding in a truſtee. [Lord KENYON Ch. J. But that muſt be an unſatisfied term, otherwiſe the jury will preſume it to have been ſurrendered.] With regard to the caſes on which the plaintiff relies, three of them are only deciſions at niſi prius; in one of them the property had been purchaſed with the earnings of the bankrupt, and therefore it came within the caſe of *Chippendale* v. *Tomlinſon*; and in another both parties claimed under the bankrupt by different conveyances. The caſe of *Chippendale* v. *Tomlinſon* is rather an authority for the defendants; becauſe that was decided not on the general ground that an uncertificated bankrupt could have property of his own, but on the ground of that being an exception from the general rule. And the caſe of *Aſhley* v. *Kell* cannot be ſupported as law: it was there holden that though under the ſtat. 5 *Geo.* 2. *c.* 30. the future effects of a bankrupt againſt whom two commiſſions have iſſued were liable to be ſeized for the benefit of the creditors, yet the bankrupt had in the mean time ſuch a property in them as enabled him *to ſell* to a bonâ fide purchaſer; by which it muſt be underſtood that a purchaſer without notice of the bankruptcy would gain by ſuch ſale a title againſt the creditors. But there is no reaſon why a bonâ fide purchaſer after two commiſſions iſſued ſhould be in a better ſituation than a bonâ fide purchaſer after a ſecret act of bankruptcy and before a commiſſion iſſued; in which caſe Lord *Hardwicke* ſaid in *Billon* v. *Hyde* (*a*) that "a ſale of the goods of the bankrupt after an act of bankruptcy committed is a ſale of the property of the aſſignees, for which they may maintain trover." The ſame doctrine is eſtabliſhed in *Kitchin* v. *Campbell*, 2 *Bl. Rep.* 829. The Legiſlature has relaxed the hardſhip of this rule in the caſe of payment of money to the bankrupt by ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 14.; in the caſe of a purchaſer by 21 *Jac.* 1. *c.* 19. *ſ.* 14.; and in the caſe of payments by the bankrupt in two particular inſtances by the ſtat. 19 *Geo.* 2. *c.* 32. *ſ.* 1. Then it ſeems ſtrange to ſay that a ſale by a bankrupt after a commiſſion iſſued is good, when a ſale by him before a commiſſion required an act of parliament to protect it.

(*a*) 1 *Vez.* 328.

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In *reply*, it was ſaid that it was not neceſſary for the plaintiff in his replication to ſhew that this was one of the excepted caſes; but that if the principle, for which the defendants contended, were well founded, the plea itſelf ſhould have negatived thoſe exceptions; and that the plea could not be ſupported on account of that omiſſion.

Lord **KENYON** Ch. J. I cannot commend the mode in which this queſtion is brought before the Court, ſince the whole merits of the caſe might have been gone into on the general iſſue: whereas here the defendants have, in addition to the plea of not guilty, pleaded a ſpecial plea which would have been bad on a ſpecial demurrer, and which will be attended with additional expence to the parties.

I will deliver this caſe in the outſet from one of the arguments urged on the part of the defendants. I admit in general the propriety of arguing by analogy to caſes of real property: but this caſe can never be compared to caſes reſpecting real property, unleſs it can be ſhewn that a ſpecial property may be recovered in ejectment while the abſolute legal property remains in ſome other perſon. The immediate right to real property muſt be veſted in one perſon only; whereas a ſpecial property in the caſe of perſonalty may be in one, as in the inſtance of carriers, while the abſolute right to it may exiſt in another. When a competition ariſes between thoſe two perſons the right of the latter muſt prevail: but as againſt all other perſons a ſpecial property is ſufficient. Now here it ſeems to be admitted that an uncertificated bankrupt may go to market with goods in his poſſeſſion and transfer the property to any other perſon; then he muſt have in ſome degree a ſpecial property in them againſt every one but his aſſignees. Let us ſee how this caſe appears on the pleadings; the plaintiff claims the goods in queſtion, alleging that he was poſſeſſed of them as of his own proper goods; the defendants in anſwer, ſay that they cannot be the goods of the plaintiff becauſe he (the plaintiff) was a bankrupt and that all his effects had been aſſigned to the aſſignees under the commiſſion; and as far as reſpected the property at the time of the bankruptcy there is no doubt but that it all paſſed under the aſſignment: but the plaintiff replies that ſince his bankruptcy he has acquired theſe goods and that he is now *lawfully poſſeſſed* of them. And why may he not be lawfully poſſeſſed of them, though acquired ſince his

his bankruptcy? It is admitted that if they were the produce of his earnings and labour he may be. The plaintiff is poſſeſſed of theſe goods, and primâ facie the poſſeſſor of perſonal property is the owner of them; that which the defendants ſtated in their plea, in anſwer to the plaintiff's claim, did not conclude the queſtion, and the replication explains the whole. Therefore on principle, and without adverting to the authorities alluded to, I am of opinion that nobody has a right to take this property from the bankrupt but thoſe who regularly claim under the commiſſion. With regard to the authorities; I certainly ſhould not rely on the caſes decided before me at niſi prius, but thoſe caſes have been ſince recogniſed in the late caſe in the Court of Common Pleas; and I ſubſcribe to the opinion given by that Court that the bankrupt has a right to theſe goods againſt the defendants who are wrong doers. Convenience and ſound policy alſo require a ſimilar deciſion. If the plaintiff had brought an action of treſpaſs inſtead of trover, his poſſeſſion would have entitled him to recover againſt a wrong doer; and the form of the action cannot alter the law. But, according to the defendants' argument, if the bankrupt gets poſſeſſion of goods ſubſequent to his bankruptcy, it is an invitation to all the world to ſcramble for the poſſeſſion of them, though the aſſignees do not chooſe to diſpute the queſtion with the bankrupt. Therefore on principle, on the authority of decided caſes, and on the grounds of policy and convenience, I am of opinion that this action may be maintained.

Ashhurst J. It appears to me that the ſpecial plea is unneceſſary, and that the rejoinder is frivolous. There was no occaſion for this plea, ſince the whole caſe would have been open to the defendants on the general iſſue. To this plea however the plaintiff replied that he was lawfully poſſeſſed of theſe goods; againſt a wrong doer it is not neceſſary to ſet out a title, a lawful poſſeſſion is ſufficient. In anſwer to this the defendants ſay that the plaintiff was an uncertificated bankrupt: but what then? If the plaintiff were lawfully poſſeſſed of theſe goods, and the aſſignees do not conteſt the matter with him, a wrong doer cannot retain the poſſeſſion of them from him. I take the general rule to be that a bankrupt has a right againſt all perſons but the aſſignees: here a lawful poſſeſſion in him is admitted, and that is ſufficient againſt wrong doers.

Grose J. I have no objection to conſider the queſtion as raiſed by theſe pleadings that the defendants wiſhed to agitate, WEBB *againſt* FOX.

namely, whether the plaintiff has ſuch a property in theſe goods as will entitle him to maintain an action of trover for them? That leads us to conſider the ſituation of an uncertificated bankrupt and that of his creditors as to the goods of which the bankrupt is poſſeſſed ſubſequent to his bankruptcy. The creditors who have not received 20*s.* in the pound are entitled to receive a ſatisfaction to that amount; but it muſt be through the medium of his aſſignees. But the creditors, who are not aſſignees, have no property in goods acquired by the bankrupt after his bankruptcy; if they take them, they are treſpaſſers. If ſuch goods be ſtolen from the bankrupt, it may be alleged in an indictment for the felony that they were his property. If he ſell them, he may receive the money for them; and if they be pawned by him, he may redeem them on tendering the money for which they were pledged. In the caſe of *Fowler* v. *Down* Mr. J. *Heath* very accurately ſtated that an uncertificated bankrupt "has a defeaſible property, which none but the aſſignees can defeat." And he compared his ſituation to that of an alien who may purchaſe lands and maintain an action for them if the Crown do not interpoſe. So here, he may maintain trover; and if he could not, all the inconveniences ſuggeſted by Lord *Kenyon* would probably enſue. Therefore as well on the authority of the caſe lately decided in the Court of Common Pleas as of the other caſes cited I think that this action is maintainable.

LAWRENCE J. In order to maintain an action of trover it is neceſſary that the plaintiff ſhould have either the abſolute or a ſpecial property in the goods that are the ſubject of the action: he need not have both; either the one or the other is ſufficient. Abſolute property is where one, having the poſſeſſion of chattels, has alſo the excluſive right to enjoy them, and which can only be defeated by ſome act of his own. Special property is where he, who has the poſſeſſion, holds them ſubject to the claims of other perſons. There may be ſpecial property in various inſtances. There may be ſpecial property without poſſeſſion; or there may be ſpecial property, ariſing ſimply out of a lawful poſſeſſion, and which ceaſes when the true owner appears. Such was the caſe of *Armory* v. *Delamirie*, 1 *Str.* 504., where a chimney ſweeper's boy, having found a jewel, carried it to a goldſmith to know what it was, who refuſed to return it; and it was holden that though the plaintiff did not by ſuch finding acquire an abſolute property, yet he had ſuch a property as would enable him to keep it againſt all but the rightful owner, and conſequently that he might maintain trover for it againſt the goldſmith, who was a wrong doer. Now that appears to me to go the whole length of deciding this caſe. Here the plaintiff ſays that he was poſſeſſed of theſe goods, to which the defendants plead that the plaintiff is a bankrupt and that all his effects are veſted in his aſſignees: and I cannot agree with the plaintiff's counſel that the plea ſhould have gone farther and ſhewn that this was not one of the caſes in which a bankrupt may have property; the plea ſtates generally that the property was out of the plaintiff. But for the ſame reaſon I think it was ſufficient for the plaintiff in his replication to ſhew a right to the goods, which he has done by alleging that he "became lawfully poſſeſſed of them ſince the bankruptcy, and that he has kept them without any claim interruption moleſtation or denial of the aſſignees." I agree with the defendant's counſel that it is not ſufficient to ſtate in a declaration in trover that the plaintiff is poſſeſſed, without adding that the property of the goods is in him: but it was not neceſſary to repeat in this replication that the property was in the plaintiff, ſince the replication ſhews thoſe circumſtances, in anſwer to the plea, from which the law will infer a ſpecial property in him, ſuch a property as enables him to maintain trover.

Judgment for the plaintiff.

GOODTITLE on the Demiſe of HOLFORD and others *againſt* OTWAY.

Friday, Nov. 10th.

(In Error from the Court of Common Pleas.)

EJECTMENT for the manors of *Stanford*, *Weſterhill*, and *Stormeſworth*, and for certain meſſuages and lands lying within the pariſh of *Stanford* in the county of *Leiceſter*, which were ſeverally laid upon the demiſe of *R. Holford* and *Thomas Clarke Jervoiſe* in the firſt count, and upon the demiſe of Sir *C. Cave* Bart. in the ſecond count, and alſo for the manors of *Swinford* and *South*

A. ſeiſed in fee, by marriage articles, agreed to ſettle his eſtates ſo as to ſecure his intended wife's jointure, and the portions of younger children, and ſubject thereto upon his eldeſt ſon in tail male; then he deviſed thoſe eſtates in fee, *in caſe he had no iſſue* and ſubject to any jointure he might make; and afterwards conveyed them by leaſe and releaſe to truſtees and their heirs in purſuance of the articles, in truſt for himſelf in fee till the marriage, and afterwards for the various purpoſes of the marriage articles, and for default of iſſue of the marriage, and ſubject to a term for ſecuring the jointure, to the uſe of himſelf in fee: he afterwards married and died without iſſue:—held that the deed of ſettlement, whereby he departed with the whole eſtate deviſed, operated as a revocation of the will, though he took back a fee by the ſame inſtrument, and though it was conſiſtent with the proviſions of the will; and that it made no difference that with reſpect to one of the eſtates the conveyance in fee to the truſtees was merely for the purpoſe of creating a term to ſecure his wife's jointure, and the ſettlor took back the fee again ſubject to that term.

Kilworth, and for certain meſſuages and lands within the pariſhes of *Swinford* and *South Kilworth* in the ſame county, upon the ſame ſeveral demiſes, in two other counts. At the trial a ſpecial verdict was found in ſubſtance as follows.

Sir *T. Cave* Bart. being ſeiſed in fee of the manors of *Stanford Weſterhill* and *Stormeſworth* and of the premiſes mentioned in the two firſt counts, and alſo of the manors of *Swinford* and *South Kilworth* and of the other premiſes mentioned in the two laſt counts, he and the Earl of *Harborough* on the 13th *December* 1790, in contemplation of an intended marriage between Sir *T. Cave* and Lady *Lucy Sherrard* daughter of the ſaid Earl, entered into articles of agreement, whereby the Earl agreed "that he would make ſuch addition to Lady *Lucy*'s fortune as would make her marriage portion amount to 30,000*l.* and that the ſame ſhould be paid and ſecured as under mentioned, (*viz.*) that he would pay down upon the marriage 20,000*l.*, and ſecure the remainder upon his real eſtate to be paid upon his deceaſe. Sir *T. Cave* agreed on his part to apply a ſufficient part of the fortune which he received upon the marriage in diſcharging a mortgage of 14,500*l.* upon his eſtate at *South Kilworth* and *Swinford*, and to ſettle the ſaid eſtate ſo as to ſecure to Lady *Lucy* a jointure thereout of 1400*l.* per annum clear for her life, to commence from Sir *T. Cave*'s deceaſe, alſo to ſecure to Lady *Lucy* out of his *Stanford* eſtate an additional jointure of 600*l.* per annum clear to commence from the death of the ſurvivor of Sir *T. Cave* and Lady *Cave* his mother; alſo to make a proviſion out of the ſaid eſtate at *Stanford*, for ſecuring to the younger children of the marriage the under-mentioned portions (*viz.*) If only one, the ſum of 15,000*l.*, if two or more the ſum of 20,000*l.* in equal ſhares. And in caſe Lord *Harborough* paid down more than 19,000*l.* Sir *T. Cave* agreed to apply the overplus towards diſcharging an incumbrance upon his *Stanford* eſtate of 11,000*l.*, and that the remainder of the ſaid 30,000*l.* when paid ſhould be applied to the like purpoſe. Sir *T. Cave* alſo agreed to ſettle his *Stanford* eſtate ſubject to the preſent Lady *Cave*'s jointure, and the reverſionary jointure to Lady *Lucy*, and the portions to the younger children, as above mentioned, upon his eldeſt ſon and his heirs male in ſtrict ſettlement." Sir *T. Cave* afterwards on 13th *March* 1791 duly made and publiſhed his will, whereby, *in caſe he ſhould happen to die without leaving any iſſue of his body living at his deceaſe*, he deviſed all his manors of *Stanford*, *Weſterhill*, and *Stormeſworth*, and all his meſſuages and lands &c. at *Stanford*, *Downton*, *Weſterhill*, and *Stormeſworth*,

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worth, (being the manors and premiſes mentioned in the two firſt counts,) and alſo all thoſe his manors of *Swinford* and all his meſſuages lands &c in *Swinford* and *South Kilworth*, (being the manors and premiſes mentioned in the two laſt counts,) and all other his real eſtate whatſoever and whereſoever *(ſubject nevertheleſs to ſuch jointure or jointures as he might thereby make upon the woman he might happen to marry,)* unto *R. Holford* and *T. Clarke Jervoiſe* their executors &c for the term of 500 years, upon the truſts thereinafter declared; and upon the determination of the ſaid term of 500 years and ſubject thereto he gave and deviſed all his ſaid manors meſſuages &c and real eſtate whatſoever to his uncle the Reverend *Charles Cave* for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of the ſaid *Charles Cave* ſucceſſively in tail male, with divers remainders over; remainder to his own right heirs for ever. He then declared the truſt of the term for 500 years to be to raiſe by mortgage ſale or otherwiſe of the eſtates compriſed in the ſaid term after his deceaſe 20,000*l.* to be divided amongſt certain relations. Afterwards by indentures of leaſe and releaſe of the 25th and 26th of *May* 1791, reciting that Sir *T. Cave* was ſeiſed in fee in poſſeſſion of the *Stanford* eſtate ſubject to an annuity of 1400*l.* payable to his mother Lady *Sarah Cave* for her life, and alſo to two terms of 200 and 1000 years then veſted in *R. Goſling* for ſecuring two ſeveral ſums of 6000*l.* and 5000*l.* with intereſt, and reciting the intended marriage between Sir *T. Cave* and Lady *Lucy*, and that Lady *Lucy* was poſſeſſed of 4500*l.* and reciting the articles of agreement before mentioned between Sir *T. Cave* and Lord *Harborough*, it was by the ſaid indenture of releaſe witneſſed that in conſideration of the intended marriage and of 4500*l.* paid to Sir *T. Cave* by Lady *Lucy*, and alſo of 14,500*l.*, paid to Sir *T. Cave* by the Earl of *Harborough*, and alſo of the two ſums of 6000*l.* and 5000*l.* thereinafter covenanted to be paid by the Earl of *Harborough* to *R. Goſling* in diſcharge of the mortgage incumbrances affecting the lands to be releaſed, and for making a jointure and proviſion for Lady *Lucy* and the iſſue of the marriage, and for ſettling the *Stanford* eſtate (in the two firſt counts mentioned) to the ſeveral uſes and truſts thereinafter declared, Sir *T. Cave* conveyed to truſtees the *Stanford* eſtate (in the two firſt counts mentioned) to hold to them and their heirs, to the uſe and intent that Lady *Sarah Cave* might receive her annuity of 1400*l.* for her life, and ſubject thereto and to the two

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terms of 200 and 1000 years veſted in *R. Goſling* to the uſe of Sir *T. Cave* and his heirs till the marriage, and after the marriage to the uſe of the truſtees for 99 years upon the truſts after mentioned; and ſubject thereto to the uſe of Sir *T. Cave* for life, remainder to truſtees to preſerve contingent remainders, remainder as to part of the eſtate to the uſe of Lady *Lucy* in caſe ſhe ſurvived Sir *Thomas Cave* and his mother, to receive an annuity thereout of 600 *l.* for her life in bar of dower; and as to the ſaid lands &c. and premiſes charged with the ſaid annuity of 600 *l.* to Lady *Lucy* after the deceaſe of Sir *T. Cave* to the uſe of the truſtees for a term of 500 years upon the truſts after mentioned, and as to all the other premiſes thereby releaſed, not compriſed in the term of 500 years, to the uſe of the truſtees for the term of 1000 years on the truſts aftermentioned, and ſubject to thoſe terms, as to all the premiſes, to the uſe of the firſt and other ſons of the marriage ſucceſſively in tail male, and for default of ſuch iſſue to the uſe of Sir *T. Cave* in fee. The truſt of the term of 99 years was declared to be for payment of the intereſt on the two mortgages to *R. Goſling* during Lord *Harborough*'s life. The truſt of the term of 500 years was declared to be for ſecuring the annuity of 600 *l.* to Lady *Lucy* when it ſhould become due. And the truſt of the term of 1000 years was declared to be for the payment of the ſtipulated portions of younger children of the marriage; with a proviſo that in caſe Sir *T. Cave* ſhould outlive Lady *Lucy*, he might charge the premiſes compriſed in the term of 500 years with an annuity of 500 *l.* to any ſubſequent wife. Then followed covenants by Lord *Harborough* in purſuance of the articles before mentioned for ſecuring and raiſing the reſidue of the 20,000 *l.* the portion of Lady *Lucy*. The ſpecial verdict then ſtated other indentures of leaſe and releaſe of the ſame 25th and 26th *May* of the premiſes mentioned in the two laſt counts compriſing the eſtates of *Swinford* and *South Kilworth*; whereby, after reciting as was before recited, Sir *T. Cave* for the conſiderations before expreſſed conveyed to the ſame truſtees and their heirs thoſe eſtates to the uſe of himſelf in fee until the marriage, and after that, to the uſe and intent that Lady *Lucy* in caſe ſhe ſurvived him ſhould receive the annuity of 1400 *l.* for her life; and after the deceaſe of Sir *T. Cave* to the uſe of the ſaid truſtees for a term of 500 years upon the truſts after mentioned, and after the determination thereof to the uſe of Sir *T. Cave* in fee; which truſt of the term for 500 years was declared to be for ſecuring Lady *Lucy*'s annuity of 1400 *l.* The ſpecial verdict then ſtated that the intended marriage took effect on the 2d *June* 1791, and that Sir *T. Cave* died on the 15th *January* 1792, without leaving any iſſue, and that *Sarah Otway*, wife of the defendant, is the ſiſter and heir at law of Sir *T. Cave*. It then ſtated the entry of the leſſors of the plaintiff, the demiſe, and ouſter.

Upon this verdict judgment was given for the defendant by the Court of Common Pleas; that Court being unanimouſly of opinion that the will had no operation with reſpect to the *Stanford* eſtate, and three Judges being of the ſame opinion with reſpect to the *Swinford* eſtate, againſt the opinion of the Lord Chief Juſtice,

This caſe was argued firſt in *Eaſter* term laſt by *Williams* Serjt. for the leſſors of the plaintiff and *Perceval* for the defendant, and now in this term by *Balguy* for the leſſors of the plaintiff and *Gibbs* for the defendant; the queſtion being whether Sir *Thomas Cave*'s will was revoked, or whether more properly it was rendered of no effect, by the ſubſequent deeds of ſettlement.

For the leſſors of the plaintiff it was argued that there was no revocation of the will. This caſe, they ſaid, was diſtinguiſhable from every other where an implied revocation had been holden. It is not a deviſe of a reverſion ſubject to a particular eſtate, but in the nature of a contingent deviſe, to take effect only on the condition of the deviſor's dying without iſſue, and ſubject to a power of jointuring. This appears on adverting to the ſeveral diſpoſitions of the property made by the reſpective inſtruments. By the articles of agreement Sir *T. Cave* was to ſettle his *South Kilworth* and *Swinford* eſtate ſo as to ſecure to Lady *Lucy* a jointure of 1400*l. per annum* after his deceaſe, and a further jointure of 600*l. per annum* after the death of him and his mother out of the *Stanford* eſtate; which latter was alſo to be ſettled upon the eldeſt ſon of the marriage and his heirs male in ſtrict ſettlement charged with the portions of younger children. If therefore he had a ſon, it would be out of his power conſiſtently with the articles to deviſe the *Stanford* eſtate, or if daughters, they and all younger children were to have their portions carved out of the ſame eſtate. And therefore it was that in his will he deviſed this eſtate *in caſe he ſhould happen to die without leaving any iſſue*; and he deviſed this and all his other eſtates *ſubject to the power of jointuring*. Then the deeds of ſettlement which purſue and confirm the articles are not inconſiſtent with that diſpoſition; for they provide for a different event, namely that of his having iſſue, in default of which only his will was to take effect, and they

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ſecure the jointures to Lady *Lucy*, which were expreſsly excepted out of the deviſe. It appears therefore that at the time of making his will the deviſor had it in contemplation that the diſpoſition contained in it ſhould not interfere with the articles, and that thoſe articles were to be carried into effect by the ſubſequent ſettlement: then the ſeveral inſtruments are connected and may well ſtand together; and the reſult is this, that if he had no iſſue his will was to ſpeak, if he married and had iſſue then the ſettlement was to ſpeak. And though the Court cannot look to any parol evidence of the deviſor's intent to conſtrue his will, yet ſo far as that intent is to be collected from the will itſelf and from the inſtruments to which it refers, they are bound to give it effect. But it is contended becauſe by the deeds of ſettlement made after the will the whole eſtate thereby deviſed was conveyed out of the deviſor, that there is a ſtrict rule of law operating in this caſe to defeat the will, which cannot be controled by any intent to the contrary. But though in point of form the eſtate was conveyed to truſtees, yet they had no ſeiſin in fact; for the conveyance to the uſe of himſelf before the marriage was exactly the ſame eſtate which he had before; he was ſtill in of the old uſe; and the only operative part of the ſettlement is that which conveys the eſtate to the uſes mentioned in the articles in an event in which the will was to have no operation. *Bro. Abr.* tit. *Done et Remainder*, *pl.* 15. ſhews what idea prevailed ſoon after the introduction of uſes. "If a man ſeiſed in fee give to *A. B.* in tail, remainder to the right heirs of the donor, the reverſion remains in him; and this is not a remainder, but the fee and reverſion remain in the donor as before the gift. And ſo it is where a man makes a feoffment to the uſe of *T.* and the heirs of his body, remainder to the uſe of the right heirs of the feoffor; there the fee-ſimple in the uſe never was out of the feoffor, and this is a reverſion in the uſe, and not a remainder; quod nota." With this agrees *Bingham*'s caſe, 2 *Co.* 91. *b.* and *Fenwick* v. *Mytford*, and the Earl of *Bedford*'s caſe, there cited. And it makes no difference whether the uſe is reſerved, or whether it reſults by implication of law. *Abbot* v. *Burton*, *Salk.* 590. and *Martin* v. *Strachan*, *ante*, 5 vol. 107. *n.* Very little is to be found in the books upon the ſubject of revocation of wills before the ſtatute of Uſes. Vide 44 *Aſſiz.* 296. *pl.* 36. *M.* 44 *Ed.* 3. 33. *a.* cited in *Dy.* 143. *a.* At that time the mode of conveyance being

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by feoffment and re-feoffment it neceſſarily operated as a revocation of a prior will; becauſe the feoffment was a direct alienation of the land deviſed, and the party taking back the land again by re-feoffment muſt take a new eſtate by purchaſe, which conſequently could not paſs under the former will. Then came the ſtatute of Uſes (*a*); after which and before conveyances by leaſe and releaſe were invented, the common mode of conveyance was by feoffment to uſes. The firſt caſe was that of *Montague* v. *Jefferies*, *M.* 38 & 39 *Eliz.* (*b*), where it was holden that "if a man deviſe *Blackacre* to *J. S.* in fee, and afterwards upon a marriage between him and *A.* covenant to make a feoffment of it to the uſe of himſelf in fee, remainder to his wife for life, remainder in fee to his own right heirs, and afterwards he makes a feoffment accordingly; though this is a revocation of the will for the eſtate for life of the wife, yet it is no revocation as to the fee; although he made a feoffment in fee to the feoffees, and limited the remainder to his own right heirs; for this is only his old reverſion without any alteration." So far the deciſion of the Court is againſt the revocation, where the party notwithſtanding the ſubſequent conveyance is in of the old uſe. It is true indeed that *Rolle* himſelf denies that caſe to be law, and thinks it would be a revocation, becauſe it appeared to be the intent of the party to have the eſtate by the new limitation. And ſo he lays down the rule in another paſſage (*c*); yet, he adds, that the contrary was decided by *Popham* in the caſe before referred to. If this were now to be argued as a new point, it would be enough to ſay that though ſuch was the opinion of a great lawyer, yet the Court adjudged otherwiſe; and the reaſon given by him for that opinion is merely artificial and contrary to the known fact in moſt caſes. But admitting the law to be as ſtated by *Rolle*, it will not apply to this caſe; becauſe here the will and the deeds are conſiſtent upon the face of them; the one was to operate in one event, the others in another. The whole doctrine goes upon an intent to revoke either expreſſed or neceſſarily to be implied by law from the inconſiſtency of the two diſpoſitions. Whereas here not only the inſtruments are not inconſiſtent, but the will refers to and confirms the articles, and the ſettlement is made in purſuance of thoſe articles; and therefore there is an expreſs intent in the deviſor that the one ſhould not be a revocation of the other,

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(*a*) 27 *H.* 8. *c.* 10.

(*b*) 1 *Rol. Abr.* 616. U. *pl.* 4.

(*c*) *Ib.* 615. Q. *pl.* 1. and 616. *pl.* 2.

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againſt which the law will not raiſe a preſumption of a different intent. Upon the ſame principle incomplete conveyances are put as inſtances of implied revocations; and with propriety if ſuch an intention is to be preſumed in the particular caſes. So in *Diſter* v. *Diſter* (*a*), where tenant in tail by bargain and ſale conveyed away his land to make a tenant to the præcipe and afterwards ſuffered a recovery to the uſe of himſelf in fee, it was holden a revocation of a prior will, becauſe he thereby acquired a different eſtate from what he had in him before, and that properly ſo on one or other of two grounds; for firſt, ſuppoſing he had not the reverſion in fee in him at the time of making his will, he had not even a deviſable eſtate; and it is clear upon the authority of *Swift* v. *Roberts* (*b*) that he could not by the ſubſequent acquiſition of the abſolute fee make good a prior deviſe of it: but ſecondly, ſuppoſing he had the immediate reverſion in fee at the time, then by the recovery he deſtroyed that very fee which he had before deviſed. The caſe of *Marwood* v. *Turner* (*c*) went on that ground. To conſider the caſes principally relied on by the defendant; the firſt is Lord *Lincoln*'s caſe (*d*); he being ſeiſed in fee, and having made his will, afterwards in contemplation of a marriage, which never took effect, by leaſe and releaſe conveyed his eſtate to truſtees and their heirs to the uſe of himſelf in fee till the marriage, then as to part in truſt for his intended wife in fee, and as to the reſidue in truſt to ſell and with the produce to diſincumber the other part, and the ſurplus to go to his executors. By that conveyance he gained a baſe fee, and ſo took back a different eſtate from what he had before, and therefore it was holden a revocation. But that was not the only alteration; for if the marriage had taken place, the lady was to have had a part of the deviſed eſtate in fee; with a power of appointment of the ſurplus reſerved to him by his *laſt* will, which had evident reference to a future diſpoſition, and plainly ſhewed an intent to revoke the will he had made. The deeds and the will therefore were not conſiſtent as they are in this caſe; Lord *Lincoln* at the time of making his will had not his marriage in contemplation, or the ſubſequent diſpoſition of his eſtate in conſequence thereof; but the will and the deeds are directly repugnant to each other: whereas here they were meant

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(*a*) 3 *Lev.* 108. S. C. put in 11 *Mod.* 157, 8.

(*b*) 3 *Burr.* 1488.

(*c*) 3 *P. Wms.* 163.

(*d*) *Show. P. C.* 154. 1 *Eq. Caſ. Abr.* 411. and 2 *Freem.* 202.

to ſtand together. The only point of ſimilitude between the two caſes is, that in both the parties took back an eſtate to them and their heirs till the marriage: but in Lord *Lincoln*'s caſe as the marriage did not take effect he died ſeiſed of that baſe fee which was a different eſtate from that which he had deviſed; whereas here the baſe fee was put an end to by the marriage, which remitted Sir *T. Cave* to his old eſtate, ſuppoſing it to have ever been out of him for an inſtant. And this is like the caſe put by Lord *Holt* in *Buckinham* v. *Cook* (*a*), that if a man is diſſeiſed and afterwards deviſes, and then enters and dies, the entry remits him to his former eſtate. The next is the caſe of *Arthur* v. *Bokenham* (*b*), though that did not turn on the queſtion of revocation, wherein Lord Ch. J. *Trevor* is ſuppoſed to have ſaid, "that the law requires a continuance of the ſame intereſt that the deviſor had at the time of making the will to remain unaltered even to the time of his death; for that *any even the leaſt alteration* of this intereſt is an actual revocation of the will." But the inſtances put by him do not ſupport ſo general a poſition: they are thoſe of tenant in tail obtaining the fee-ſimple by fine and recovery, and tenant in fee enfeoffing another to the uſe of himſelf in fee. "And *ſo*, (ſays he,) it was adjudged in Lord *Lincoln*'s caſe, though "*ſo ſmall an alteration* was in the eſtate." But nothing of that kind appears in the deciſion of Lord *Lincoln*'s caſe, where the alteration made was very conſiderable, and ſhewed an intention to revoke; as in *Pollen* v. *Huband* (*c*), which was properly holden a revocation, becauſe by the deed of releaſe the deviſor did not take back the ſame fee, but merely a power of appointment by deed or will, evidently referring to a future will to be made. The next caſe principally relied on is that of *Parſons* v. *Freeman* (*d*). There *Freeman*, being entitled by marriage articles to an equitable eſtate in fee in conſequence of his promiſing to do certain acts for his wife's benefit, deviſed the ſame; but afterwards failing to perform his part came to a new agreement with his wife, in conſequence of which they ſuffered a recovery of her eſtate and ſettled it to different uſes, he taking the eſtate ſubject to their joint appointment inſtead of an abſolute fee. There is no reſemblance therefore between that caſe and the preſent as to the principal point decided: But Lord *Hardwicke* there

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(*a*) *Holt's R.* 252.

(*b*) 11 *Mod.* 157, 8. *Fitzg.* 241. *Holt's R.* 750.

(*c*) 1 *Eq. Ca. Abr.* 412.

(*d*) 3 *Atk.* 741. and 1 *Wilſ.* 308.

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relied upon the caſe put in 1 *Rol. Abr.* 615. that where a man makes a feoffment to the uſe of himſelf in fee, ſtill that is a revocation; which he ſays is a prodigious ſtrong caſe, and gives the reaſon for it that the conſtruction muſt ariſe from a preſumed intention to revoke. The ground of application therefore fails in the preſent caſe, where there is an apparent intention to the contrary. And it is remarkable that Lord *Hardwicke* did not put that caſe on the ground now contended for of a momentary ſeiſin in the truſtees. Again he is made to ſay in the report of the caſe that if the conveyance or recovery be for a particular (*a*) purpoſe, there it is no revocation; ſtill leſs then ought this to be ſo conſidered, when the deviſor meant that all the inſtruments ſhould ſtand together, and that there ſhould be no revocation even in part. The caſe of *Sparrow* v. *Hardcaſtle* (*b*), alſo relied on, is as little in point. It was there decided that a conveyance of an advowſon in fee to truſtees was a revocation of a prior deviſe of ſuch advowſon; but there the truſtees themſelves took a beneficial intereſt under the deed, and the ſubject-matter itſelf was conveyed away. What is there and alſo in *Ambler* (*c*) ſuppoſed to be ſaid by Lord *Hardwicke*, that any alteration or new-modelling will make it a different eſtate and operate as a revocation, is evidently taken from the words of the reports in 11 *Modern* and *Fitzgibbon*. That poſition in its full latitude certainly cannot be ſupported, and it is not warranted by the Lord Chancellor's note of Lord *Hardwicke*'s judgment; though it may be true that any new-modelling which makes it a different eſtate will amount to a revocation: but here was no new-modelling of the eſtate to that purpoſe; Sir *T. Cave* after the marriage was ſeiſed of his old eſtate; the acts which took place ſubſequent to his making his will were in his contemplation at the time, and the diſpoſition which he made was conſiſtent with the ſubſequent deeds. *Darley* v. *Darley* (*d*) is alſo relied on; where tenant for life, with remainder to truſtees &c, remainder to himſelf in fee deviſed, and afterwards by leaſe and releaſe conveyed the ſame premiſes to truſtees in fee to the uſe of the releaſees in fee, and by indenture executed five weeks afterwards he declared the intent of the releaſe to be to make a tenant to the præcipe to ſuffer a recovery; which was holden to be a revocation. But there it was immaterial what the uſes were declared to be; for du-

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(*a*) It ought to have been a particular *partial* purpoſe, *vid.* what is ſaid by Lord Chancellor in *Brydges* v. The Ducheſs of *Chandos*, 2 *Vez.* Jun. 431–2.

(*b*) 3 *Atk.* 798.

(*c*) *Ambler* 224. *S. C.*

(*d*) 3 *Wilſ.* 6.

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ring all the intervening period the whole eſtate which he had deviſed was conveyed away. Laſtly came the caſe of *Brydges* v. the Ducheſs of *Chandos* (*a*); in that it appeared that there were marriage articles by which the Duke covenanted to ſettle his eſtates in a particular manner; he afterwards made his will, confirming the articles; and then in purſuance of his covenant by leaſe and releaſe conveyed the ſame eſtate to truſtees and their heirs for the purpoſes of the ſettlement: but the ſettlement ſo far differed from the articles that it was agreed that it could not have relation to them; for by the articles the Ducheſs, who was the deviſee, was to have her dower, and by the ſettlement ſhe was to have a certain rent charge: the iſſue alſo took a different intereſt under the articles and under the ſettlement; it appeared therefore that the will and the ſettlement were inconſiſtent with each other, and conſequently the latter muſt neceſſarily operate as a revocation of the former. Lord Chancellor in pronouncing his decree relied upon this diſtinction; for, ſaid he (*b*), "in all the caſes where the ſubſequent deed is held no revocation, it muſt be upon this condition at leaſt that the deed and the will are not totally inconſiſtent with each other; according to *Cro. Jac.* 49. where the determination turns upon this, that the deed ſhall not revoke the will ſo far as it ſtands with it." Upon a review of all the caſes of revocation of wills by ſubſequent inſtruments it appears that they were founded either on a legal preſumption of an intention in the deviſor to revoke, not rebutted by an expreſs intent appearing to the contrary; or where he took back by the conveyance a different eſtate from what he had at the time of making his will; or that the very eſtate deviſed was conveyed away; or as in the laſt caſe where preceding articles were referred to and confirmed by the will, yet the ſubſequent ſettlement was inconſiſtent therewith, ſo that the two could not ſtand together; none of which grounds apply to the preſent caſe. Then as to the authorities in favour of the deviſee, they referred to, 1ſt, *Williams* v. *Owens* (*c*), where by marriage articles the huſband covenanted to convey to the uſe of himſelf for life, remainder in truſt to ſecure an annuity to his wife, remainder to truſtees to raiſe portions, remainder to his ſons and daughters ſucceſſively in tail, remainder to his own right heirs; afterwards he deviſed upon condition that he ſhould leave no iſſue; and afterwards conveyed to truſtees in fee in purſuance of the articles. This was holden to be no revocation, becauſe the deviſor

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(*a*) 2 *Vez.* Jun. 417. (*b*) 2 *Vez.* Jun. 434. (*c*) 2 *Vez.* Jun. 595.

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viſor had in equity the ſame equitable eſtate at the time that he made the will as afterwards, though he afterwards parted with the legal eſtate. 2d, The caſe of a deed of partition not being a revocation of the will of a tenant in common is ſtrongly in favour of the preſent. 3d, *Riſley* v. *Baltinglaſs* (*a*), and 4th, *Luther* v. *Kidby* (*b*), which is recognized in *Swiſt* v. *Roberts* (*c*). But in *Tickner* v. *Tickner* (*d*) it was holden that, where the deed of partition ſo far altered the eſtate as to let in a power of appointment, it operated as a revocation. Thoſe caſes ſhew that where the fee comes back differently modified to the party the deed operates as a revocation of a prior will, otherwiſe not; and yet in the caſe of *Luther* v. *Kidby* the ſame ſort of conveyance was made uſe of which it is objected in this caſe amounts to a revocation: the whole eſtate was equally out of the party; and yet becauſe the Court ſaw that it was for a particular purpoſe, they held it no revocation. On the other hand it was holden a revocation in *Tickner* v. *Tickner* becauſe there was an intention manifeſted to revoke the teſtamentary diſpoſition. It is in vain to attempt to explain away the caſe of the partition on the ground of the form of the old writ of partition (*e*) at common law, by which no eſtate was conveyed out of the party; for at this day the form of conveyance is the ſame as (it is now contended) works a revocation. Beſides the general arguments which apply to the whole caſe, the Lord Ch. Juſtice of the Common Pleas took a diſtinction as to the *Swinford* eſtates grounded on *Hodgkinſon* v. *Wood* (*f*), that where a man deviſes in fee, and afterwards creates only a term, that ſhall not operate as a revocation. That being the general principle of law, the queſtion is whether the mere inſtrumental mode of carrying that intent into effect will make a difference in the legal conſequences. If the intent in this caſe had been carried into execution by a common law conveyance, it is clear that it would only have been a revocation pro tanto; then can the form of conveyance by leaſe and releaſe alter the law (*g*)? But it cannot be ſaid here even to be a revocation pro tanto, becauſe the eſtate is deviſed *ſubject to the jointure;* and therefore as to ſo much of the eſtate it never was deviſed at all, which makes this caſe ſo much the ſtronger. And even if the Court would imply a revocation from a mere naked

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(*a*) *T. Ray.* 240. 8 *Vin. Abr.* 144. *pl.* 6.

(*b*) 3 *P. Wms.* 170. *n.* 8 *Vin.* 148. *pl.* 30.

(*c*) 3 *Burr.* 1491.

(*d*) Cited in 3 *Atk.* 742.

(*e*) *Vid. Fitzh. N. B.* 142.

(*f*) *Cro. Car.* 23. *Vid.* 1 *Rol. Abr.* 616.

(*g*) *Vid.* 3 *Atk.* 749.

feoffment

feoffment after a deviſe, though the feoffor took back again the ſame eſtate, where no other reaſon appeared for ſuch an act, yet they have never gone that length where there did appear a particular reaſon for the act, and where the intention not to revoke was apparent upon the face of the inſtruments.

For the defendant it was argued, that if this were a new queſtion and the Court were only to look to the intention of the deviſor, it might be a caſe of difficulty, but that after the various authorities which are to be found in the books upon the ſubject there could be no doubt that the deeds operated as a revocation of the antecedent will. The rule is laid down generally that where a perſon ſeiſed of an eſtate deviſes it, and afterwards conveys away his whole intereſt, though but for an inſtant, and though he takes back the eſtate to the ſame uſe as before, or though the old uſe reſults to him again, ſo as to deſcend in the ſame line as before, ſtill it operates as a revocation of his will; becauſe the conveyance deſtroys the ſubject matter of that upon which the will was to have operated. For in order to give effect to a will of lands it is not enough that the deviſor dies ſeiſed of the ſame lands which he had deviſed, but he muſt die ſeiſed of the ſame eſtate in the ſame lands. Any queſtion therefore of intent, or any conſideration whether the inſtruments are conſiſtent or not, is quite beſide the purpoſe; for the law does not permit a man to diſpoſe by will of an after-purchaſed real eſtate, be his intention to that purpoſe expreſſed ever ſo plainly. The general rule abovementioned is laid down in all the books upon the ſubject, beginning with the authority of *Rolle* which has been referred to. Before the ſtatute of Uſes if one ſeiſed in fee deviſed, and afterwards made a feoffment, and took back a fee, that muſt neceſſarily have operated as a revocation; for though he took back the ſame land by a ſimilar title, yet he did not take back the ſame eſtate. That is not diſputed. The ſtatute of Uſes certainly raiſed a queſtion upon this ſubject, which firſt occurred in *Montague* v. *Jeffries* (*a*), and was afterwards determined in favour of a revocation (improperly ſo called) in *Diſter* v. *Diſter* (*b*). It is ſtated in two different paſſages in *Rolle*. In the firſt place it was holden to operate as a revocation where the feoffor takes back the old eſtate which he had before; and in the other where he takes it back ſubject to an eſtate for life in the wife, which may be ſaid to be only for a ſpecial purpoſe: in both it

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(*a*) 1 *Rol. Abr.* 615. *pl.* 1. and 616. *pl.* 2.

(*b*) 3 *Lev.* 108.

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it is ſaid that he takes back the eſtate *as a new purchaſe*. It is objected indeed to this that it was only the opinion of *Rolle* againſt the judgment of the Court: but that opinion has been adopted as law ever ſince, by Lord Ch. J. *Pemberton* and the reſt of the Court in *Diſter* v. *Diſter* (*a*); by Lord Ch. J. *Trevor* in *Arthur* v. *Bokenham* (*b*); by Lord *Hardwicke* in *Parſons* v. *Freeman* (*c*), and in *Sparrow* v. *Hardcaſtle* (*d*); by Lord *Mansfield* in two other caſes (*e*); and lately by Lord Chancellor *Loughborough* in *Brydges* v. The Ducheſs of *Chandos* (*f*). And the authority of Lord *Mansfield* is the ſtronger, becauſe he thought the principle, by which he held himſelf bound, was very objectionable. The caſe of *Diſter* v. *Diſter* (*a*) was where a recovery ſuffered by tenant in tail was holden a revocation of a prior will. This was endeavoured to be anſwered by ſaying that the eſtate was thereby completely altered, and he took back a different eſtate from what he had before: but that in ſtrictneſs is not ſo, for the recovery does not in legal contemplation deſtroy the eſtate tail, but the iſſue in tail and thoſe claiming after are thereby barred on account of the ſuppoſed recompence in value recovered from the vouchee. A fine indeed deſtroys the eſtate tail and lets in the reverſion. The general principle was alſo eſtabliſhed in Lord *Lincoln*'s caſe (*g*); but there it is ſaid that the ſettlement and the will were inconſiſtent, and that the former ſhewed an intention to revoke the will. That however is not the reaſon given in the books; but it is this general ground, that the party ſeiſed had by a conveyance ſubſequent to his will parted with the eſtate deviſed, though he took back the old eſtate by the ſame conveyance. In *Arthur* v. *Bokenham* (*b*) Lord C. J. *Trevor* not only ſtates the caſe of a tenant in tail ſuffering a recovery by which a prior will of the ſame land is defeated, but alſo the caſe of a tenant in fee making a feoffment to the uſe of himſelf in fee, which has the ſame operation, although he takes back the ſame eſtate which he had before. That cannot be founded upon any ſuppoſed intent of the party, but altogether upon a rule of law, namely, that he has parted with the eſtate deviſed: his Lordſhip there ſays, that the ſame intereſt deviſed muſt remain in the deviſor to the time of his death, and that any the leaſt alteration

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(*a*) 3 *Lev.* 108.

(*b*) *Fitzg.* 241. 11 *Mod.* 157, 8.

(*c*) 3 *Atk.* 741.

(*d*) *Ib.* 798.

(*e*) *Roe* v. *Griffiths*, 4 *Burr.* 1960. and *Doe* v. *Pott*, *Dougl.* 722.

(*f*) 2 *Vez.* Jun. 417.

(*g*) *Show. P. C.* 154. 1 *Eq. Caſ. Abr.* 411. 2 *Freem.* 202.

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of the eſtate is a revocation of the will. To this it is objected that the doctrine is not ſupported by Lord *Lincoln*'s caſe to which he refers: but Lord *Trevor* was referring to the principle and not to the particular caſe; and his opinion is entitled to more weight in this particular as he was conſidered by Lord *Hardwicke* to be a very liberal Judge. But the ſame doctrine was holden by Lord *Camden* in *Darley* v. *Darley* (*a*), though he was as much diſſatisfied with the rule as Lord *Mansfield* expreſſed himſelf to be in the caſes before alluded to. But if Lord *Lincoln*'s caſe had turned merely on the ground of an intention to revoke, Lord *Mansfield* could not have objected to it on the ground of it's being a ſhocking abſurdity, repugnant to feeling, and founded on nice legal ſubtlety. He evidently conſidered that the deciſion was founded upon the ſtrict technical rule of law, in oppoſition to the intent of the party. Lord *Hardwicke* adopted the ſame rule in *Parſons* v. *Freeman*(*b*), and in *Sparrow* v. *Hardcaſtle* (*c*). In the latter he ſaid, "that the eſtates muſt remain in the ſame plight and unaltered "to the time of the teſtator's death; for any alteration or "new-modelling will make it a different eſtate and occaſion a "different conſtruction at law, unleſs in ſome excepted caſes." Theſe exceptions he afterwards ſtates to be confined to mortgages and other ſecurities for money and to conveyances for raiſing money to pay debts and to the caſe of a partition. It has even been holden that a recovery ſuffered to confirm a will is a revocation (*d*); which is deciſive to ſhew that the intention of the deviſor can have no operation againſt the rule of law. The ſame principle was eſtabliſhed in the caſe of *Brydges* v. TheDucheſs of *Chandos* (*e*), as appears in the note of Lord *Hardwicke*'s opinion read by Lord Chancellor, where he ſaid, that if a particular intention would have ſaved the revocation it would have prevailed in Lord *Lincoln*'s caſe. In the caſe of *Brydges* v. The Ducheſs of *Chandos* it was not diſputed but that the ſubſequent conveyance in fee to truſtees operated as a revocation of the prior will at law: but it was contended that inaſmuch as if one having an equitable eſtate deviſes, and afterwards takes the legal eſtate, that will not operate as a revocation; ſo if one having a legal eſtate ſubject to equitable articles, by virtue of which he would in equity be conſidered only as having an equitable eſtate, deviſes,

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(*a*) *Vid.* 3 *Wilſ.* 6. and 13. in margin.
(*b*) 3 *Atk.* 741.
(*c*) *Ib.* 798.
(*d*) 3 *Atk.* 803.
(*e*) 2 *Vez.* Jun. 417.

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and afterwards conveys his legal eſtate in compliance with the articles, neither ſhall that operate as a revocation. It is true that it was one of the arguments relied on in anſwer that the ſettlement was not in purſuance of the prior articles, but it was not the only or the principal ground of the deciſion, which was that the Duke by the ſubſequent conveyance had parted with the eſtate which he had before deviſed; and it was immaterial what eſtate he took back again. The caſe of *Luther* v. *Kidby* (*a*) relied on was the caſe of a partition, which is admitted to be an excepted caſe. That was probably founded upon the conſideration that the party by proceſs of law might have been compelled to do the ſame thing which is now done by deed of partition, and that as his eſtate would not have been altered in the one way, it ſhall not be taken to be ſo in the other which was ſubſtituted for it. The exception however proves the rule; which has been conſtrued ſo ſtrictly, that where in *Tickner* v. *Tickner* (*b*) the eſtate was taken back with a very trifling alteration, it was holden to operate as a revocation; that being, as it was ſaid, a new-modelling of the eſtate by his own act, and not ariſing out of the nature of it. If therefore the queſtion of revocation in theſe caſes turns upon the ſtrict rule of law ariſing out of the alteration of the eſtate in the deviſor, and does not depend upon his intention, then whether the deviſe be contingent or not, or whether or not the intention expreſſed in the deed be conſiſtent with that in the will, it cannot make any difference in the legal conſequence; for it is ſtill an attempt to paſs an after-purchaſed eſtate by a will made before, which the law does not allow, however plainly the party may have intended it. In *Moor* 789, the feoffment was to the uſe of the will, and therefore certainly conſiſtent with it; and yet it was holden to work a revocation of the will.

Lord Kenyon Ch. J. We are now called upon to review a judgment given by a moſt reſpectable authority, the Court of Common Pleas; and as it has been repreſented to us that there was a difference of opinion in that Court, I could have wiſhed to ſee an account of what paſſed there.

I will not repeat the whole of this caſe, but merely obſerve one fact, that the marriage ſettlement, executing the articles, and on which the principal queſtion depends, limits the reverſion in fee to the uſe of Sir *T. Cave* his heirs and aſſigns for ever; therefore

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(*a*) 3 *P. Wms.* 170. *n.* 8 *Vin. Abr.* 148. *pl.* 30.

(*b*) Cited 3 *Atk.* 742.

therefore the whole uſe is diſpoſed of in ſome way or other. It has been ſaid in the courſe of the argument that the doctrine of revocations of wills under circumſtances ſimilar to the preſent is not bottomed in reaſon, and that it would be abſurd to permit it to prevail in this caſe: but if ſuch an obſervation were an anſwer to a rule of law, it might be applied with equal ſucceſs in a variety of other inſtances. On what foundation of reaſon does the whole doctrine of a common recovery ſtand, which takes away an eſtate, that the Statute de donis meant to be unalienable, from the iſſue in tail on the ground of their receiving a recompence in value from the common vouchee? But it is now too late to argue that common recoveries are not to be ſupported. Lord *Northington*, giving a hiſtory of common recoveries, ſaid that when the tyranny of the great barons had paſſed the ſtatute de donis in order to make their poſſeſſions unalienable, the reluctant ſpirit of the times found means to elude its operation in a commercial country, otherwiſe it would have confined all the landed property in the kingdom in a few hands and would thus have taken away the rewards of induſtry. There are alſo ſeveral other rules which, however hard they may preſs upon certain individuals, are notwithſtanding the acknowledged law of the land. If a collateral warranty deſcended on a perſon without aſſets, he was liable to be ſtripped of all his property by that rigid rule of law until the beginning of this century (*a*). And the rule in deſcents of excluding perſons of the half-blood ſtill prevails. However it is ſufficient, in anſwer to objections to eſtabliſhed rules of law of this kind, to ſay ita lex ſcripta eſt. Thoſe who are confident in their ſuperior abilities may perhaps fancy that they could erect a new ſyſtem of laws leſs objectionable than that under which they live: I have not that confidence in mine, and am ſatisfied by the deciſions, and ſeries of deciſions, of great and learned men on the rules of law under which the landed property of this country is now held; and it is my duty as well as my inclination to follow and give effect to thoſe rules. If I had not been fettered with authorities, and could have indulged my wiſhes in this caſe, I could have wiſhed to give effect to the intention of the late Sir *T. Cave*, that the eſtates in queſtion belonging to the ancient family of *Cave* ſhould accompany the title: but if the rules of law will not permit that intention to be carried into execution, we muſt be governed by thoſe rules.

(*a*) *Vid.* Stat. 4 & 5 *An.* c. 16.

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I will not go through all the caſes that have been cited in the argument, becauſe they were reviewed by Lord *Hardwicke* in *Parſons* v. *Freeman*, and *Sparrow* v. *Hardcaſtle*. I am old enough to remember that great Judge, though but for a ſhort time, before he left the Court of Chancery; and the knowledge of thoſe who lived before me only fortified me in the opinion I formed of him, that his knowledge of the law was moſt extraordinary; he had been trained up very early in the purſuit, he had great induſtry and abilities, and was in ſhort a conſummate maſter of the profeſſion. The firſt of thoſe caſes, according to the late Mr. *Dunning*'s note, was decided on the 6th of *May*, *M.* 25 *Geo.* 2., and the other in *E.* 27 *Geo.* 2. The former of theſe was not an opinion given by Lord *Hardwicke* on a ſudden, (for that indeed was not his practice) but after mature conſideration, and after the caſe had been argued by Sir *D. Ryder*, Mr. *Murray*, and other great men, who, had they been diſſatisfied with his opinion, would moſt probably have appealed againſt his decree. He was afterwards called upon in *Sparrow* v. *Hardcaſtle* to review the opinion he had before given in the caſe of *Parſons* v. *Freeman*; and I cannot do better on this occaſion than refer to thoſe parts of his opinion that are the moſt applicable. [His Lordſhip here read and commented upon ſeveral paſſages from the note (*a*) of that caſe, which was taken by the late Lord *Aſhburton*, applying them to the different arguments

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(*a*) " SPARROW v. HARDCASTLE, 6th *May*, *E.* 27 *Geo.* 2.

" *Lord Chancellor* HARDWICKE. The general queſtion in this cauſe is, whether the deviſe of the advowſon of *Addle*, as part of the teſtator's real eſtate, has been revoked or not? and that depends on one ſhort fact.

" *Cyril Arthington* by his will dated 28th *July* 1716. deviſed all his eſtate real and perſonal, without mentioning this advowſon particularly, to truſtees &c.; by which he made his nephew *Cyril Hardcaſtle* tenant for life with remainders over. After this by a codicil he revoked that diſpoſition, and gave to his nephews *C. A.* and *C. H.* jointly &c. After this by a ſecond codicil dated 21 *Nov.* 1723 he revoked the former codicil as to *C. Arthington*, and left the former deviſe to operate as to *C. H.* &c. On the ſame day he executed a grant of this advowſon of *Addle* to Sir *W. Hawkeſworth* and others and their heirs; and it ſtands on the evidence that this grant was executed after the codicil. After this a deed of truſt was executed by Sir *W. Hawkeſworth* &c, whereby the conveyance of the advowſon was declared to be in truſt, that the truſtees ſhould preſent ſuch ſon of *R. Jackſon* as ſhould be qualified to accept it on the firſt or any future avoidance, and if none ſhould be then qualified to preſent another perſon in the mean time, taking a bond from him to reſign. And then follows this proviſo, that in caſe when the church ſhall firſt become void, or on any future vacancy, *Jackſon* ſhould have no ſon, or one of his ſons ſhould be preſented and refuſe to accept the ſame, the truſtees were to ſtand ſeiſed for the grantor or his heirs and to reconvey on requeſt, and in the mean time to preſent ſuch perſon as the grantor or his heirs ſhould direct and for want of ſuch direction whomſoever they ſhould think meet. A ſon of *Jackſon* has been preſented, ſo that the truſt is performed; and now this bill is brought by the heirs of the grantor to have a conveyance. Whether or no they are entitled to it muſt depend on the arguments urged in this caſe on behalf of the plaintiff, and, obſerving upon the excepted caſes, he ſaid that that of *Luther* v. *Kidby* was law and had frequently been acted upon.] From the

the queſtion, whether the will as to the advowſon in queſtion was revoked by the conveyance, or whether any thing therein paſſes to the deviſee.

" To effectuate a deviſe the general principles are, that at the time of making it the teſtator muſt have a diſpoſing capacity of mind, and an eſtate in the premiſes which he takes upon him to diſpoſe of; and *that eſtate muſt remain in the ſame condition till his death, for any alteration, any new-modelling, of the eſtate after the will, will be a revocation of it, unleſs in certain caſes which ſhall be mentioned.* Such are the general principles, and the caſes ſupporting them are ſtrong. If a man make a will deviſing land, and after execute a feoffment to his own uſe, it is a revocation of the will, notwithſtanding it is in point of law the old uſe, and will deſcend ex parte paternâ or maternâ as before. So likewiſe a feoffment without livery, a bargain and ſale not enrolled, or any other imperfect conveyance will be a revocation, becauſe it imports an intention of altering the condition of the eſtate. *So where after making a will the teſtator executes any legal conveyance it is a revocation,* becauſe the eſtate is gone, and the will has loſt the ſubject of its operation. Thus in the caſe of Ld. *Lincoln* v. *Rolls*, *Equ. Caſ. Abr.* 409. *Edward* Earl of *Lincoln* made a marriage ſettlement on a perſon whom he never married or aſked to marry him; though this was a conveyance made for a ſpecial purpoſe and he was in of the old uſe, it was determined by the Houſe of Lords to be a revocation of his will. Nay it has been carried ſo far that where a man after making his will, thinking he had only an eſtate tail, ſuffered a recovery to confirm the will, it was holden to be a revocation of it.

" Thus far have the caſes gone, and the principles eſtabliſhed by them have been relied on here, and are univerſally allowed to be law, without referring to the particular caſes as they ſtand in the books. But the diſtinction taken here is that Mr. *Arthington*, by executing theſe inſtruments together, intended them as parts of one act, whereby the whole fee was to be diſpoſed of; *that the grant was deſigned for a particular purpoſe,* viz. *to create a truſt for the benefit of a ſon of* Jackſon, *and ſubject to that truſt the whole eſtate was to paſs by the will.* And it has been contended that though the truſt was further declared to be for the grantor and his heirs, it was the ſame as if he had left it to reſult, for in either caſe ſo much of the truſt as remains in him will paſs by his will: but I find no authority for this, and I am of a different opinion. *If a man ſeiſed of a real eſtate deviſe it, and after convey the legal eſtate though there be only a partial declaration of truſt, yet as he has granted the whole legal eſtate, it is a revocation of the will.*

" In the caſe of *Parſons* v. *Freeman*, *M.* 25 *G.* 2. it has been ſaid that I declared it to be my opinion that if a man ſeiſed of a truſt eſtate deviſe the ſame, and afterwards take a conveyance of the legal eſtate, that does not revoke the will. I did ſay ſo obiter, but as that was not the point in queſtion, I do not think myſelf concluded by it: I am however ſtill of the ſame opinion, and am confirmed in it by a caſe in 1 *Rol. Abr.* 616. *pl.* 3., in which my Lord *Rolle* refers to *M.* 38 and 39 *Eliz. B. R.* The caſe referred to is plainly that of *Montague* v. *Jefferys*, and the *plac.* immediately preceding this, *viz. pl.* 2. cites the caſe of *Montague* v. *Jefferys* in that manner. This was probably allowed for law in that caſe, for it is probable my Lord *Rolle* had a further report of this caſe than any that has been publiſhed. There were two eſtates, the legal and the uſe; ſo that a man by taking a conveyance of the dry legal eſtate had done no act to alter the beneficial intereſt.

" The principal ground on which they put this caſe is, that this grant was only intended for a particular purpoſe, and when that purpoſe was anſwered the eſtate was not intended to be altered but to remain as before; and this was compared to a mortgage. A mortgage for years (ſay they) is at law only a revocation pro tanto; and in equity a mortgage in fee is the ſame as being an act intended for a particular purpoſe, and any other act intended for a particular purpoſe muſt (it is contended) be conſidered in the ſame light. Mortgages, to be ſure, have been determined to be only revocations pro tanto: but I do not find that the caſes warrant putting theſe determinations on that ground. None of them are expreſſed to be determined on the foundation of a ſpecial purpoſe, except *Vernon* v. *Jones*, which Mr. *Vernon* reports (2 *Vern.* 241.) with a quære; for the beginning to the end of that caſe the doctrine that Lord *Hardwicke* wiſhed to eſtabliſh was this, that any alteration of the eſtate or conveyance to uſes after making the will, though the old uſe remains, (which is the caſe here,) is in law a revocation of the will. Suppoſe that in this caſe Sir *T. Cave* had merely made a conveyance to the uſe of himſelf and his heirs for ever; that would undoubtedly have operated as a revocation of his will: then can the other uſes, to which he conveyed the eſtate, make any alteration?—It has been ſuppoſed in the courſe of the argument that the caſe of *Brydges* v. The Ducheſs of *Chandos* proceeded on equitable principles: but I know that the preſent Lord Chancellor meant by that deciſion to confirm the doctrine eſtabliſhed by Lord *Hardwicke*. I do not enter into the reaſons upon which all the caſes have been determined, becauſe the beſt rule is ſtare deciſis; but my opinion is formed upon the authority of all the caſes from the time of Lord *Rolle*. Such were the opinions of Lord *Trevor*, Lord *Hardwicke*, and Lord *Mansfield*, the latter of whom, though

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for as to *Hall* v. *Dunch*, (1 *Vern*. 329.) it was not ſaid that the eſtate was granted for a ſpecial purpoſe, but it is doubtful whether the Court went on the point of a total revocation or republication. Theſe caſes however are certainly rightly determined, for they are caſes of ſecurities for money. The reaſon why mortgages, &c, are taken out of the general rule is this; it does not depend on the general ground inſiſted on at the bar of being conveyances for a particular purpoſe, but on the foot of being a ſecurity only. Whether the mortgage be for years or in fee is all one in this court, they are alike conſidered as chattel intereſts; a mortgage in fee goes to the executors (for whom the heir is only a truſtee), ſupports no dower, and has no one property of a real eſtate. That being ſo, it is not at all inconſiſtent to ſay ſuch an inſtrument is no revocation; for the caſe there is no more than this; the teſtator ſeiſed of a real eſtate deviſes that real eſtate, and afterwards parts with nothing but what is perſonal.

"But to compare this with the preſent caſe. The grant here paſſes the whole legal eſtate; and the declaration of the truſt includes the whole right of preſentation (which is the profits of an advowſon); ſo that not only the whole legal eſtate but the whole truſt is parted with; for if the heirs of the grantor do not think fit to nominate, the heir of the grantee on every avoidance is to nominate whom he pleaſes. This I take to be very material; for the deviſee, if he take it, muſt take it ſubject to that general truſt; not that I think this determination need depend on ſuch a nicety. *The caſes of this ſort do not depend on ſuch a general ground as that of being intended for a ſpecial purpoſe; for* (as Mr. *Henley* ſays very juſtly) *there could not be a more ſpecial caſe than that of Lord* Lincoln. Lord *Trevor* takes up theſe conſiderations and the caſe of Lord *Lincoln* in a caſe that was mentioned by Mr. *Noel* in a book he cited (*Fitzg*. 241.) which I do not care to rely on as it is of no authority, though this and ſome other caſes are well reported in it; this particularly, for I have a manuſcript note of it; and I chooſe to rely on the opinion of Lord *Trevor*, who had a freer way of thinking than moſt of the common law judges.

"I am therefore of opinion that the plaintiffs the heirs at law are entitled to this advowſon, and muſt decree accordingly, unleſs the defendant chooſes to try that fact of the priority of the execution of the codicil to the grant; for upon that it depends, and this fact is ſupported by the evidence of one perſon only, ſpeaking too from his memory after 30 years.

"Dr. *Arthington* declined trying it, ſo the decree was afterwards pronounced agreeably to this opinion."

GOODTITLE *against* OTWAY.

finding fault with former deciſions, thought himſelf fettered by the authorities. I take it therefore that the law of the land is now clearly and indiſputably fixed, if at any time it can be fixed, that where the whole eſtate is conveyed away to uſes, though the ultimate reverſion comes back again to the grantor by the ſame inſtrument, it operates as a revocation of a prior will. That being the law, I am bound (how unfortunate ſoever it may be in this caſe) to give my opinion in favour of the defendant; and conſequently the judgment given by the Court of Common Pleas muſt be affirmed.

ASHHURST J. The queſtion here is not whether Sir *Thomas Cave* intended to revoke his will, but whether, on the ſeveral facts appearing in this caſe, he has done any act, which the law ſays ſhall be a revocation of the will. The counſel who argue in favour of the will cannot but own that the current of authorities is againſt them: and if they are ſo, and thoſe authorities are not of yeſterday only, but have the ſtamp of antiquity, and have been ſanctioned by the moſt reſpectable authorities almoſt down to the preſent times, that ſeems to me a deciſive reaſon why they ſhould not now be ſhaken. One would always wiſh that the law were certain upon all ſubjects, but it is more emphatically important that it ſhould be ſo in queſtions concerning real property. The deciſions of the law are the great landmarks for the ſafety and regulation of real property. And perhaps it is of leſs importance how the law is determined than that it ſhould be determined and certain; and ſuch determinations ſhould be adhered to, for then every man may know how the law is: and if individuals will indulge their own private whims, or will be ſo negligent as not to apply to thoſe who have the reputation of being the beſt verſed in the ſcience, they themſelves are the moſt to blame. Now it is an ancient, clear, and well-known maxim, that in order to diſpoſe of an eſtate by will it is neceſſary that the party ſhould have the ownerſhip of the land in him at the time of making the will, and that there ſhould be a continuance of the ſame intereſt till the time of the death of the deviſor, when the will is to take effect. This was ſo determined a century ago in *Fitzg.* 240. and 3 *Lev.* 108. and followed by Lord *Hardwicke*, 3 *Atk.* 803. and by Lord *Mansfield*, 4 *Burr.* 1960.; where he ſays that if a man deviſes his eſtate and afterwards conveys it entirely away, though he take it back by the ſame inſtrument or by a declaration of uſes, it is a revocation; becauſe, as it is ſaid in the books, he has parted with his whole eſtate. And the ſame was determined in Lord *Lincoln*'s caſe, *Show. Parl. Caſ.* 154. Lord *Mansfield*, I admit, was not pleaſed with the principle on which Lord *Lincoln*'s caſe was determined; but he ſaid that the principle was ſo far eſtabliſhed by the caſe that it ought to be obſerved in future, and we muſt not depart from it now. This in my opinion gives the greater weight to his Lordſhip's ſentiments; for it ſhews how ſtrongly he was impreſſed with the idea of the danger of removing ancient landmarks in the law. If the authorities ſtood in equilibre, then his Lordſhip's diſapprobation of the principle might have its weight; but in truth the authorities are almoſt all on that ſide. I ſhall not take up the time of the Court in going through all the caſes that have been ſo fully ſtated, and which ſeem to me ſo firmly to have eſtabliſhed the principle that they ought not to be ſhaken. If we were to overturn them and ſet the queſtion at ſea again, and make it a mere queſtion of intention, there would be no fixed principle to reſt upon, and every different man might form a different conjecture. Stare deciſis is a ſafe and prudent maxim: then it is every man's own fault if he does not take ſuch advice as will be ſure to lead him right, and the perſons adviſing will have the means of doing it; but if every thing is ſet afloat again, the ableſt conveyancers may not be able to direct him. I have forborne to enlarge upon the particular facts of this caſe which have been already fully ſtated; and if the principle is allowed, there can be no doubt but the preſent caſe will be governed by it.

GROSE J. and LAWRENCE J. expreſſed themſelves of the ſame opinion, declining to enter into a conſideration of all the caſes cited, as the Lord Chief Juſtice had already diſcuſſed the ſubject in ſo able a manner.

Judgment affirmed.

Friday,
Nov. 17th.

TANNER *againſt* HAGUE.

If a plaintiff conſent to the defendant's being diſcharged out of execution on his undertaking to pay at a future day, he cannot afterwards ſue out *any* execution on that judgment in the event of the defendant's not fulfilling his undertaking.

THE defendant, having been charged in execution at the ſuit of the plaintiff, was diſcharged on his undertaking to pay the debt at a future day; on non-payment of which at the day the plaintiff ſued out a fieri facias againſt him.

Erſkine now ſhewed cauſe againſt a rule calling on the plaintiff to ſhew cauſe why the latter writ and the proceedings on it ſhould not be ſet aſide, arguing that the releaſe of the defendant was conditional, and that as the condition had not been performed the plaintiff had a right to ſue out another writ of execution.

Chambre, in ſupport of the rule, relied on the caſes of *Vigers* v. *Aldrich* (*a*), *Jaques* v. *Withy* (*b*), and *Clark* v. *Clement* (*c*), to ſhew that a releaſe of the defendant in execution under circumſtances ſimilar to the preſent concluded the plaintiff's right to any execution againſt either the perſon or goods of the debtor on the ſame judgment; adding that the plaintiff was not without remedy, as he might now ſue the defendant on the agreement; and that there was only one caſe in which the plaintiff can retake a defendant who has been once in execution, namely, the caſe of an eſcape.

The Court ſaid that the caſes cited proceeded on this ground that it was conſidered that the plaintiff received a ſatisfaction in law by having his debtor once in cuſtody in execution; and on the authority of thoſe caſes they made the

Rule abſolute.

(*a*) 4 *Burr.* 2482. (*b*) *Ante*, 1 vol. 557. (*c*) *Ante*, 6 vol. 525.

AGUILAR and Others *againſt* RODGERS.

Monday, Nov. 20th.

The inſurer on freight agreed to return part of the premium "if the ſhip ſailed with convoy and *arrived*;" held that the aſſured were entitled to that return, the ſhip having ſailed with convoy and arrived, though ſhe had been captured and recaptured and the aſſured had been obliged to pay for ſalvage.

THIS was an action of aſſumpſit brought to recover a return of premium on a policy of inſurance. The facts, which were all admitted, were ſhortly theſe. On the 20th of *June* 1796 the defendant underwrote for 200*l.* a policy on the freight in the ſhip, called the *Jackſon*, at and from *Jamaica* to *London*, warranted to ſail on or before the 26th of *July* 1796 with convoy for the voyage at the rate of ten guineas *per cent.*, to return 2*l. per cent.* "if ſhe ſailed on or before the 1ſt of *July* 1796, and arrived." Afterwards by a memorandum indorſed on the policy, 15th of *Auguſt* 1796, and ſigned by the defendant, it was agreed in conſideration of ten guineas *per cent.* additional premium that the warranty of ſailing with convoy ſhould be annulled, and the defendant undertook to return 10*l. per cent.* "if the ſhip ſailed with convoy and arrived." The ſhip ſailed from *Jamaica* on the 26th of *July* with convoy, but ſeparated in bad weather and was captured on the 26th of *October* by a *French* ſhip, recaptured by a king's ſhip on the 5th of *Nov.*, and carried into *Cork* where ſhe was delivered up to the owners on paying

9*l.*

1797.

Aguilar *againſt* Rodgers.

9*l.* 14*s.* 7*d. per cent.* for ſalvage; and afterwards ſhe arrived at the port of *London* with her cargo on board. The defendant paid into court 19*l.* 9*s.* 2*d.*, the amount of the ſalvage on the 200*l.*

A verdict was taken for the plaintiffs; to ſet aſide which a rule niſi was obtained on a former day. This caſe now came on to be argued by *Gibbs* and *Park* for the plaintiffs and *Erſkine* and *Giles* for the defendant.

For the plaintiffs it was contended that they were entitled to a return of the additional premium, inaſmuch as the ſhip had ſailed with convoy and had arrived in port.

The defendant inſiſted that the evident meaning of the parties, in making the memorandum, was that the additional premium ſhould not be returned unleſs the ſhip *arrived free from loſs occaſioned by the enemy.* And, to ſhew that a bare arrival would not alone be ſufficient to entitle the plaintiffs to a return of the premium, they put the caſe of a ſhip being inſured to a neutral port and being taken by an enemy on her voyage and carried by the enemy into that very neutral port, in which caſe the ſhip would arrive at her port within the words, but (as they inſiſted) not within the meaning, of ſuch a memorandum.

Both parties relied on the caſe of *Simond* v. *Boydell* (*a*), (where it was holden that the ſhip arrived within the meaning of a ſimilar memorandum, though ſhe had ſuſtained a loſs occaſioned by a ſea riſk;) the plaintiffs on the determination itſelf, and the defendant on particular expreſſions uſed by Lord *Mansfield* in giving his opinion.

Lord Kenyon Ch. J. Although my opinion fluctuated during the courſe of the trial, for the caſe of *Simond* v. *Boydell* was not fully ſtated there, at laſt I formed an opinion favourable to the plaintiffs' claim, which after reconſidering the caſe I ſee no reaſon to alter. I agree with the defendant's counſel that every arrival of the ſhip at her port of deſtination would not be an arrival within the fair conſtruction of this memorandum; ſuch, for inſtance, as an arrival in the poſſeſſion of an enemy at a neutral port, ſuppoſed by the defendant; or an arrival at her port in *England* as the property of other perſons after a capture. But in order to ſatisfy the meaning of the memorandum it ſhould be an "arrival at the deſtined port *in the courſe of her voyage;*" and in this caſe I think the ſhip did arrive at the port of *London* in the courſe of her voyage. It is now too late to controvert the authority

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(*a*) *Dougl.* 268.

authority of *Hamilton* v. *Mendes* (*a*), even if we were diſpoſed ſo to do, which I am not, where it was holden that though the aſſured may abandon on hearing of a capture, yet if they do not abandon and the ſhip be afterwards recaptured, it muſt be conſidered as if ſhe had never been out of the poſſeſſion of the owners. It is eighteen years ſince the caſe of *Simond* v. *Boydell* was decided: that caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added after *arrived* "ſafely from the enemy," or ſome words to that effect. But the words here uſed are not equivocal; and we ought not to depart from them; it would be attended with great miſchief and inconvenience if in conſtruing contracts of this kind we were not to decide according to the words uſed by the contracting parties. Suppoſe this queſtion had ariſen on a contract under ſeal, and an action of covenant had been brought, aſſigning as a breach the non-arrival of the ſhip at the port of *London*, the anſwer that in fact the ſhip did arrive there in the courſe of her voyage would have been deciſive. And if ſo this memorandum muſt receive the ſame conſtruction in this action. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, I am of opinion that the verdict ought not to be ſet aſide.

Grose J. (*b*) and Lawrence J. expreſſed themſelves of the ſame opinion.

Rule diſcharged.

(*a*) 2 *Burr.* 1198.

(*b*) Mr. J. *Aſhhurſt* was abſent on this day and the remainder of the term.

Boehm and Others *againſt* Sterling and Others.

Monday, Nov. 20th.

Where the drawers of a banker's check iſſued it nine months after it bore date upon a conſideration which afterwards failed as between them and the perſons to whom they delivered it, they cannot be permitted to object this circumſtance in an action brought by a ſubſequent holder for a valuable conſideration and without notice; though by the general rule any perſon receiving a negotiable inſtrument after it is due is deemed to have taken it upon the credit of the perſon from whom he received it, and ſubject to the ſame equities as between him and the party ſued on ſuch inſtrument.

The plaintiffs declared upon a bill of exchange dated 17th *February* 1796, drawn by the defendants upon Meſſrs. *Down*, *Thornton*, and Co. payable to bearer for 2444*l.* 14*s.* which was refuſed payment by the drawees. It appeared that the houſe of *Muilman* and *Nantes*, having agreed to lend the defendants their acceptance, had accordingly on the 15th *November* 1796 accepted a bill of exchange of that date drawn on them

1797.

BOEHM *againſt* STERLING.

by the defendants for 2444*l.* 14*s.* at three months date, which would become due on the 18th *February* 1797, which bill the defendants negotiated. And as a counter-ſecurity for the purpoſe of enabling *Muilman* and *Nantes* to take up their acceptance when due, the defendants gave them the following check upon their bankers, upon which the preſent action was founded;

"*Bartholomew-Lane* "London 17th *February* 1796 (*a*).

"Meſſrs. *Down*, *Thornton*, *Free*, and *Cornwall*, Pay Mr. *Dobſon* or bearer 2444*l.* 14*s.* "*Sterling*, *Hunters*, and Co."

Muilman died, and *Nantes* his ſurviving partner became a bankrupt before the day when their acceptance became due, in conſequence of which the defendants were obliged to take up their bill drawn upon that houſe. In the mean time on the 20th *January* 1797 before the death of *Muilman* or bankruptcy of *Nantes*, they had paſſed the defendants' draft on *Down* and Co. to the plaintiffs for a valuable conſideration, namely a precedent debt, the plaintiffs being at that time ignorant of the tranſaction between the defendants and *Muilman* and *Nantes*. The draft when tendered at *Down* and Co.'s was refuſed payment; and in a ſubſequent converſation on the ſame day between an agent for the plaintiffs and one of the defendants, the latter ſaid that it ought not to have been preſented for payment, as they had paid it on a bill of *Muilman* and *Nantes* (meaning the acceptance above-mentioned); but they ſhould wiſh to pay this draft provided they could prove the bill under the commiſſion againſt *Nantes;* and that he had ſent the night before to the plaintiffs to deſire a meeting in order to accommodate this buſineſs, and was ſorry they had not met as an accommodation might have taken place; and if the plaintiffs would prove under the eſtate of *Nantes*, they the defendants would endeavour to provide for the payment of this draft. The defendants afterwards refuſed to pay the draft.

It was contended at the trial on the part of the defendants that this was like the common caſe where a perſon takes a bill of exchange from an indorſer after it has become due, in which caſe the indorſee muſt ſtand in the ſame ſituation and ſubject to the ſame equities as the perſon from whom he received it, according to the caſe of *Brown* v. *Davies* (*b*) and *Taylor* v. *Mather* there cited. And that as in this caſe *Muilman* and *Nantes* could not have recovered againſt the defendants on this draft, becauſe the conſideration as between them had failed by the non-payment of their

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(*a*) This was ſuggeſted by the defendants counſel to have been ſo dated by miſtake for 1797.

(*b*) *Ante*, 3 vol. 80.

their acceptance, ſo neither could the plaintiffs recover who had taken the draft from *Muilman* and *Nantes* nine months after it was due; which circumſtance alone ſhould have induced them in common prudence to have made inquiry concerning the occaſion of the draft being ſo long outſtanding. Lord *Kenyon* however was of opinion that it was a queſtion for the jury to decide whether the plaintiffs had received this draft bonâ fide and without knowledge of the circumſtances under which *M.* and *N.* held it; and if ſo, he thought, though not without ſome doubt, that the mere circumſtance of its being ſo long outſtanding at the time was not ſufficient to exonerate the defendants from their liability under the circumſtances of this caſe; whereupon the jury found a verdict for the plaintiffs.

A rule having been granted on a former day in this term, calling on the plaintiffs to ſhew cauſe why there ſhould not be a new trial on the ground that in point of law the taker of ſuch a bill or draft after it is due muſt ſtand or fall upon the title of the perſon from whom he received it; and that here, as *M.* and *N.* could not have recovered on the draft under the circumſtances, the plaintiffs could not be in a better ſituation;

Garrow, *Gibbs*, *Adam*, and *Park*, now ſhewed cauſe againſt the rule. And firſt, upon the general queſtion, they denied that there was any general rule of law limiting the negotiability of a draft on a banker: it was due at all times, as againſt the drawer, when the holder thought proper to demand payment. It was an appropriation of ſo much of the drawer's money in the hands of the banker to anſwer the draft whenever it ſhould be preſented; and a perſon having given ſuch a draft could not without a breach of good faith withdraw the fund ſo appropriated. They admitted that the holder by keeping ſuch a draft in his hands an unreaſonable time after it was given took upon himſelf the riſk of the banker's reſponſibility: but as to what was a reaſonable time, it was a queſtion of fact for a jury; but no ſuch queſtion could ariſe here, where the drawees remained ſolvent, and no loſs had accrued to the drawers from the laches of the holder. They contended further that a banker's check was an inſtrument of negotiability notorious in the commercial world, and frequently paſſed from hand to hand long after it bore date. That ſtrictly ſpeaking it was not due before it was demanded; and in that reſpect it differed from a bill of exchange or promiſory note which was made payable on a particular day. That the caſe of *Brown* v. *Davies*(a) was

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(a) *Ante*, 3 vol. 80.

BOEHM *againſt* STERLING.

was of this latter deſcription; and Lord *Kenyon* in that caſe diſſented from the general doctrine laid down by Mr. Juſtice *Buller*, that the mere circumſtance of ſuch a note being over due was ſufficient to let in evidence of ſatisfaction as between the maker and the perſon from whom the plaintiff received it without notice of any fraud: but his Lordſhip relied upon a circumſtance of ſuſpicion apparent upon the face of the note itſelf, namely, that it had been diſhonoured. So here, they admitted, that if it had appeared upon the face of the draft itſelf to have been a mere counter-ſecurity, or if any knowledge of the tranſaction as between *M.* and *N.* and the defendants could have been brought home to the plaintiffs, that might have been a ſufficient anſwer to the action. But that theſe were all circumſtances proper for the conſideration of the jury, as was admitted by *Buller* J. in *Taylor* v. *Mather* (*a*); and the jury having decided by their verdict that the plaintiffs were bonâ fide holders for a valuable conſideration without notice, the Court would not diſturb their deciſion. They compared this to the caſe of notes of the Bank of *England*, or of country banks payable in like manner to bearer, which are negotiated in common experience long after they bear date, without any objection of this kind having ever been ſuggeſted. And they ſaid that it would be of material prejudice to paper credit if bonâ fide holders of ſuch inſtruments were at all events liable to be turned round upon any defect of title in thoſe through whoſe hands they had paſſed. But, ſecondly, they contended that the plaintiffs were at leaſt entitled to retain the verdict under the particular circumſtances of the caſe; for it appeared that the defendants themſelves had iſſued this draft nine months after it bore date, and therefore they were eſtopped from objecting to its negotiability on that account. And it was plain from the whole tranſaction that they intended at the time that *M.* and *N.* might negotiate it if they pleaſed; for they negotiated *M.* and *N.*'s acceptance for which this draft was given in exchange. The plaintiffs were therefore eſtopped from contending that this was a fraud upon them, or that it was not according to the real underſtanding of the parties. That this was confirmed by the ſubſequent conduct of one of the defendants; by which it appeared that before *M.* and *N.*'s acceptance became due they knew that their draft had been negotiated to the plaintiffs; and ſo far from conſidering themſelves as not liable to pay it, they actually engaged to do ſo

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(*a*) Cited *ante*, 3 vol. 80.

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if the plaintiffs would prove the amount under *Nantes*' commiſſion. That theſe circumſtances at all events took this caſe out of the general rule.

Erſkine and *Giles*, contrà, made three queſtions. 1ſt, Whether *Muilman* and *Nantes* could have recovered in this action; 2dly, If not, Whether the plaintiffs can be in a better ſituation than thoſe from whom they received the draft; 3dly, If not, Whether the ſubſequent promiſe could be of any effect. Firſt, *Muilman* and *Nantes* could not have recovered, becauſe the conſideration failed on which they had received the draft: it was given as a counter-ſecurity for their acceptance, and merely for the purpoſe of taking that up when it ſhould become due. It was therefore contrary to good faith in them to paſs it into any other hands for any other purpoſe. Secondly, The plaintiffs cannot be in a better ſituation than *Muilman* and *Nantes*. It is now eſtabliſhed as a general rule of law that whoever takes a bill of exchange or promiſory note after it is due takes it upon the title of the perſon from whom he received it, and ſubject to all equities as between ſuch perſon and the party who is liable on the face of the inſtrument. This rule grew by degrees from the neceſſity of the thing, from principles of public policy and convenience, and to prevent frauds which it was ſcarcely poſſible to detect in each particular inſtance. In the caſe of *Taylor* v. *Mather* (*a*) it was ſaid by Mr. Juſtice *Buller* that if there were any circumſtances of fraud in the tranſaction, and the inſtrument came into the plaintiff's hands after it was due, he always left it to the jury on the ſlighteſt circumſtance to preſume that the indorſee was acquainted with the fraud. But between that caſe and the caſe of *Brown* v. *Davies*, a period of near two years, it was found that ſo many caſes had occurred at niſi prius, where although there was much ground for ſuſpicion it was impoſſible to procure legal proof of the fraud, that the Court conſidered it better for the furtherance of juſtice to adopt that as a rule of law, which before was conſidered more as a rule of evidence, namely, that where a bill or note was taken after it was due the party ſhould ſtand in the ſituation of the perſon from whom he received it and be taken to have notice of all that the other knew concerning it. This rule has ſince been adopted by Lord *Kenyon* in a late caſe of *Good* v. *Coe* at niſi prius, where the plaintiff had taken the note on which he ſued for a valuable conſideration three months after it was due; and it appearing

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(*a*) Cited in *Brown* v. *Davies*, *ante*, 3 vol. 83.

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that the note had been loſt by the true owners, and that the perſon from whom the plaintiff received it had notice of this, his Lordſhip held on the principle above-mentioned that the plaintiff was not entitled to recover. Then it was attempted to diſtinguiſh this caſe from thoſe by ſaying that this was a banker's check, and that ſuch ſecurities are due at all times whenever preſented. But it is in truth and in legal conſideration a bill of exchange according to the cuſtom of merchants; it is declared upon as ſuch, and could not have been declared on in any other manner. And in the next place the time of its becoming due is within a reaſonable time after it bears date, and not at any diſtance of time. What that reaſonable time is was conſidered in *Metcalf* v. *Hall* (*a*), and in *Tindal* v. *Brown* (*b*). In ſtrictneſs it ought to be preſented the ſame day if there be time and the parties live in the ſame place, or if not within the banking hours of the next day at furtheſt: if the parties live at a diſtance the draft ſhould be ſent by the firſt poſt. But though circumſtances may happen to excuſe a party in this reſpect of laches, of which the Court and jury muſt judge, ſtill however it ſhews that what ſhall be conſidered as a reaſonable time is not altogether at the diſcretion of the holder, as the argument on the other ſide aſſumes; and at all events nine months muſt be admitted to be an unreaſonable time. Beſides, it is clear that the holder of a banker's check, not preſenting it in reaſonable time, runs the riſk of the banker's ſolvency; for if the latter become inſolvent the drawer of the check would certainly be diſcharged by the laches of the holder. This differs the caſe from that of bank notes and other caſh notes of private bankers, to which it has been compared, by keeping which the holder does not riſk loſing any part of the ſecurity by laches, there being only the drawers reſponſible for the payment; and Lord *Mansfield* ſaid in *Heylyn* v. *Adamſon* (*c*), that while a promiſory note continues in its original ſhape it bears no ſimilitude to a bill of exchange, but the reſemblance begins when it is indorſed. There is another ſtrong diſtinction between the caſes; for bank notes and other like notes are negotiable, and are ſo conſidered by the parties: whereas a banker's check is not ſo conſidered, and whoever receives it in payment takes it on the credit of the perſon giving it, and not on the intrinſic credit of the inſtrument itſelf. As to the argument that the draft ought in conſcience to be conſidered as ſo

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(*a*) *Tr.* 22 *Geo.* 3. *B. R.* (*b*) *Ante*, 1 vol. 167. (*c*) 2 *Burr.* 676.

much money appropriated by the drawer to the uſe of the holder in the banker's hands, the ſame conſideration might apply to ſave the laches of the holder in general caſes of bills of exchange. But what the defendants contend for here is not that they were diſcharged by the mere circumſtance of the plaintiffs' having taken the draft ſo long after it bore date, but that in conſequence thereof the plaintiffs ſhall be deemed by the rule of law to have had notice of the tranſaction between the defendants and *Muilman* and *Nantes;* and that the defendants may ſet up the ſame defence in this action which they might have done if it had been brought by *Muilman* and *Nantes*, upon whoſe credit the plaintiffs took the draft. Thirdly, If by law the defendants were diſcharged from the payment of this draft in conſequence of the conſideration having failed as between them and *Muilman* and *Nantes*, in whoſe ſituation the plaintiffs muſt ſtand, then the ſubſequent promiſe to pay by the defendants, even if it could be conſidered as an abſolute one, is void, and cannot give a ground of action, as was holden in *Bleſard* v. *Hirſt* (*a*), and *Goodall* v. *Dolley* (*b*). But beſides, it was only a conditional promiſe, and the plaintiffs have not performed the condition required of them.

Lord KENYON Ch. J. The caſe of *Brown* v. *Davies* came before me at niſi prius very ſoon after I took my ſeat in this court; and the grounds on which I then proceeded were ſuch as my own reaſon ſuggeſted to me at *Guildhall*, not being then much acquainted with the practice at niſi prius. I then thought that if a perſon gave a check on his bankers and meant to act honeſtly, he would not afterwards alter the ſtate of his accounts ſo as not to leave a ſufficient ſum in his banker's hands to anſwer that demand, but that ſo much money ſhould at all events be appropriated to the payment of the check; and if that were done, no inconvenience could poſſibly ariſe to any perſon; and I obſerve in a caſe in Lord *Raymond* (*c*) that ſuch was Lord *Holt*'s opinion. But when that caſe was brought before this Court on a motion for a new trial, it appeared that there was a rule in ſuch caſes that the party taking a bill of exchange after it is due takes it ſubject to all the equity to which the party from whom he takes it is liable. And I do not mean to call that rule in queſtion now; though in that caſe I grounded my opinion on the particular circumſtances of the caſe, it appearing on the face of the bill that it had been diſhonoured;

(*a*) 5 *Burr.* 2670. (*b*) *Ante*, 1 vol. 713. (*c*) *Mutford* v. *Walcot*, 1 *Ld. Raym.* 575.

honoured; I thought that that diſtinguiſhed it from the general caſe, and that diſtinction was not denied by the majority of the Court. However I do not wiſh to ſet that queſtion afloat again.

At the time of this trial I thought there was a difference between bankers' checks and bills of exchange, and that the rule adopted with regard to the latter did not apply to the former: but on further conſideration I do not think that that diſtinction is well founded. But the defendants' poſition that bankers checks are not conſidered by merchants as negotiable inſtruments appears moſt extraordinary; for this very inſtrument, on which the action is brought, ſhews the contrary: it was made payable to *Dobſon* or bearer, and inſtead of being given to *Dobſon*, to whom it was payable in the firſt inſtance, it was immediately delivered to thoſe under whom the plaintiffs claim.

Let us conſider the particular circumſtances of this caſe, on which alone my opinion proceeds. The propoſition on which the defendants rely is, not that the plaintiffs have not given a valuable conſideration for the check, nor that the bankers on whom the check is drawn had not aſſets in their hands to pay it, nor that the plaintiffs when they took it conceived any doubt but that the defendants would pay it, but that they (the defendants) on the 15th of *November* 1796 ſent this check into the world with it's own death-wound about it, and that it was not negotiable at all, even when it was iſſued by them: and after having perplexed the world with the confuſion of dates occaſioned by their own act, they now have the audacity to ſay in a court of juſtice that becauſe payment was not demanded by the plaintiffs nine months before it was even iſſued by themſelves payment of the bill cannot be enforced at all. But this is too groſs a fraud to be practiſed on the plaintiffs, who are bonâ fide holders of the bill. The rule eſtabliſhed in *Brown* v. *Davies* and in the other caſe there referred to was framed to exclude fraud, and it profeſſed to be founded on grounds of juſtice. Whereas here the demand is founded in juſtice; and all the difficulty is occaſioned by the defendants themſelves who iſſued this bill with the objection, of which they now wiſh to take advantage, appearing on the face of it: but I am clearly of opinion on principles of law as well as juſtice that it is not competent to them to take this objection.

GROSE J. When this motion was firſt made I thought it a queſtion of great importance as it appeared to break in upon the

rule

rule laid down in the caſes referred to; but it now turns out that the particular circumſtances of this caſe take it out of the general rule. To determine that the plaintiffs cannot recover would be permitting the defendants to practiſe a groſs fraud.

LAWRENCE J. I agree that this caſe depends on it's own particular circumſtances, and that it ought not to be governed by the deciſion in *Brown* v. *Davies*. It was evidently the intention of the parties that this check ſhould be a negotiable inſtrument; for though it was drawn in favor of *Dobſon* or bearer, it was immediately put into the hands of *Muilman* and Co. And when it is conſidered that it was not iſſued until nine months after it bore date, it could not have been intended by the defendants that the date of the bill ſhould throw any difficulty on the holder. It was manifeſtly the intention of the parties that if *Muilman* and Co. paid their acceptance they ſhould be at liberty to paſs this check to whom they pleaſed; and if ſo, it was not neceſſary for the plaintiffs to inquire how *Muilman* and Co. got poſſeſſion of the check. Therefore as between theſe parties the rule laid down in *Brown* v. *Davies* does not apply, though I think it ought to obtain in all other caſes, and that it is not infringed by a determination in favor of the plaintiffs in this caſe.

Rule diſcharged.

TAUNTON *againſt* COSTAR.

Tueſday,
Nov. 21ſt.

A tenant holding over after the expiration of his term cannot diſtrain the landlord's cattle which were put upon the premiſes by way of taking poſſeſſion.

IN replevin for taking the plaintiff's cattle in a certain cloſe called *Aſton's Eyott*, the defendant avowed the taking under a demiſe of the locus in quo from the Warden and College of *All-Souls*, *Oxford*, who were ſeiſed in fee, to one *Jackſon* for twenty years from the 1ſt *January* 1788, and which *Jackſon* demiſed to the defendant for a year from 21ſt *December* 1788, and ſo from year to year as long as both parties pleaſed, by virtue of which the defendant entered and was poſſeſſed at the time when he diſtrained the plaintiff's cattle damage feaſant. To this the plaintiff pleaded in bar, that before the demiſe to *Coſtar* *Jackſon* made his will and appointed certain perſons executors, and afterwards on the 20th *March* 1795 died, whereby the ſaid executors became entitled to the reſidue of the term, and that they ſold and aſſigned the ſame to the plaintiff, who being poſſeſſed of and entitled to the ſame before the time when &c. and ſix calendar months before

1797. TAUNTON *againſt* COSTAR. the 21ſt *December* 1796 gave the defendant notice to quit, by force of which the demiſe to him determined; after which the plaintiff entered into the locus in quo and put his cattle therein, as he lawfully might for the cauſe aforeſaid &c. Replication by the defendant that he ought not to be barred &c, becauſe he did not quit or give up the poſſeſſion of the ſaid place in which &c. to the plaintiff, or in any manner abandon the poſſeſſion of the ſame in purſuance of the notice to quit; but on the contrary continued to hold the poſſeſſion thereof after the ſaid 21ſt *December* until and at the ſaid time when &c., and from thenceforth continually has been and ſtill is in poſſeſſion of the ſame, &c. To this there was a general demurrer, and joinder.

Wood in ſupport of the demurrer was ſtopped by the Court, who aſked *Williams* Serjt. for the defendant whether it was poſſible to ſupport the replication.

Williams Serjt. ſaid he could diſtinguiſh this caſe from *Taylor* v. *Cole* (*a*), where the ſheriff, to an action of treſpaſs for breaking and entering the plaintiff's houſe and expelling him, pleaded as to the expulſion that he entered by virtue of a writ of execution and aſſigned the plaintiff's intereſt to *T. H*, who afterwards entered &c. *and peaceably and quietly expelled the plaintiff &c.*: whereas here it appears that the plaintiff entered upon *the defendant's poſſeſſion*, and that the latter retained the poſſeſſion ſtill; ſo that if the plaintiff could juſtify his act in this caſe, it would diſpenſe in future with the neceſſity of bringing an ejectment where the party is entitled to enter againſt another who holds the poſſeſſion.

Lord KENYON Ch. J. The caſe is too plain for argument. Here is a tenant from year to year, whoſe term expired upon a proper notice to quit, and becauſe he holds over in defiance of law and juſtice he now attempts to convert the lawful entry of his landlord into a treſpaſs. If an action of treſpaſs had been brought, it is clear that the landlord could have juſtified under a plea of liberum tenementum. If indeed the landlord had entered with a ſtrong hand to diſpoſſeſs the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the ſlighteſt pretence for conſidering him as a treſpaſſer in this caſe; and therefore there muſt be judgment for the plaintiff.

GROSE J. and LAWRENCE J. concurring,

Judgment for the plaintiff (*b*).

(*a*) *Ante*, 3 vol. 292.

(*b*) Vide *Birch* v. *Wright*, *ante*, 1 vol. 387, 8. the action of ejectment ſuppoſes the defendant to be a treſpaſſer.

DOE on the Demiſe of LEE COMPERE *againſt* HICKS and Another.

Tueſday, Nov. 21ſt.

Where after a deviſe to one for life the deviſor limited the eſtate to truſtees *and their heirs* in truſt to preſerve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his deceaſe; and he afterwards gave other eſtates for lives with ſeveral remainders over, and after each eſtate for life he interpoſed the ſame eſtate to truſtees and their heirs: held that this ſhewed his intent to be, that the eſtates to the truſtees ſhould be confined to the lives of the ſeveral tenants for lives, and conſequently that thoſe in remainder took legal eſtates, there being no other circumſtances in the will to ſhew a contrary intent. Where tenant for life levies a fine, though it is no bar to thoſe in remainder, yet it ſeems that a remainder-man muſt make an actual entry before he can maintain an ejectment; and where an entry is neceſſary the demiſe muſt be laid after it.

IN ejectment for a manor meſſuages and land in the pariſh of *Winchcombe* in the county of *Glouceſter*, the declaration contained two counts, one laying the demiſe on the 25th *March* 1794, the other on the 3d *June* 1797. A general verdict was taken for the leſſor of the plaintiff at the trial; and a new trial was moved for and a rule to ſhew cauſe obtained on two grounds; 1ſt, (which went to both counts) that the leſſor of the plaintiff who claimed and was entitled to the premiſes under the will of *Thomas Compere* could not recover, not having the legal title in him, which was then outſtanding in truſtees under the will. 2dly, (which went to the firſt count only) that while the premiſes were in the poſſeſſion of *Anthony Compere* (brother of the deviſor) as tenant for life under the ſame will under whom the defendants claimed, he levied a fine, and the leſſor of the plaintiff whoſe right of entry was not thereby bound, not having made an actual entry before the 2d *June* laſt, could not recover upon the firſt demiſe which was antecedent to that time.

By the will of *Thomas Compere* in 1737, on which the firſt queſtion turned, after ſeveral deviſes, he deviſed "his lands and hereditaments in the pariſh of *Winchcombe* &c. after the deceaſe of his wife to his father *A. C.* for life, remainder to *John Compere* for life, and from and after the determination of that eſtate *unto truſtees and their heirs in truſt to preſerve contingent remainders from being defeated, and to make entries and bring actions &c, nevertheleſs to permit the ſaid* John Compere *to receive the rents and profits during his life; and from and after his deceaſe, unto the firſt and other ſons of the body of the ſaid* J. C. in tail male ſucceſſively, and in default of ſuch iſſue unto his brother *Anthony Compere* (by whom the fine was levied) for life, *and after that eſtate determined unto the ſaid truſtees and their heirs to preſerve the contingent remainders in manner aforeſaid;* and *from and after the deceaſe of his brother* A. Compere, to the firſt and other ſons of his body in tail male ſucceſſively, and for want of ſuch iſſue unto his nephew *R. Auſtine* for life, and *after that eſtate determined unto the ſaid truſtees and their heirs in manner aforeſaid;* then to the firſt and other ſons of his body in

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" tail male ſucceſſively; and for want of ſuch iſſue unto his couſin " *G. Compere* for life, then to the truſtees and their heirs *in manner aforeſaid*, then to the firſt and other ſons of his body ſucceſſively in tail male; and for want of ſuch iſſue unto the firſt " ſon of *T. Compere* deceaſed for life, then to the truſtees and " their heirs *in manner aforeſaid*, then to the firſt and other ſons " of his body ſucceſſively in tail male; for want of ſuch iſſue then " to the ſecond ſon of the body of the ſaid *Thomas G.* deceaſed " for life, *then to the ſaid truſtees in manner aforeſaid*; then to the " firſt and other ſons of his body in tail male ſucceſſively, and for " want of ſuch iſſue unto his own right heirs for ever." He alſo deviſed other parts of his eſtate in the ſame manner, interpoſing the limitations to truſtees to preſerve contingent remainders after the determination of ſeveral other eſtates for life, " to them and " their heirs in manner aforeſaid," except in one inſtance, where the limitation to the *heirs* of the truſtees is omitted, though it was to them *in manner aforeſaid*.

The leſſor of the plaintiff claimed under one of the limitations ſubſequent to the deviſe to truſtees and their heirs, and to the life-eſtate to *A. Compere* by whom the fine was levied.

Plumer, *Leyceſter*, and *Mills*, ſhewed cauſe. As to the firſt objection; although the limitations to the truſtees are in terms made to them *and their heirs*, generally, without confining their eſtate to the reſpective lives of the tenants for lives, yet upon the whole of the will it appears plainly to have been the intention of the deviſor that the truſtees ſhould not take a fee abſolute, but merely conditional, ſo long as the eſtates for lives endured. This appears, 1ſt, becauſe the purpoſe of the limitation is expreſſed to be to preſerve the contingent remainders from being defeated, and to permit the tenants for lives to receive the profits during their lives. 2dly, The limitations to the truſtees and their heirs are upon the reſpective *determinations* of the life-eſtates, but the deviſes over are upon the *deceaſes of the tenants for life*; thereby ſhewing the meaning of the deviſor to be that the limitations to the truſtees and their heirs ſhould enure in caſe of the determination of the life-eſtates by any other means than by the deaths of the tenants for lives, and that in thoſe events the deviſes over ſhould take effect. 3dly, The deviſes over are of legal eſtates, and not merely to the uſe of the reſpective takers, as they would have been had the deviſor conſidered that the firſt limitation to the truſtees and their heirs ſtill ſubſiſted. 4thly, If the abſolute fee were intended to be limited to the truſtees by the firſt deviſe to them, it would have been unneceſſary to have created the ſame eſtate again after each ſucceſſive deviſe to the ſeveral tenants for lives. This was neceſſary to be done according to the plaintiff's conſtruction: but according to the defendant's conſtruction all the deviſes to the truſtees in fee after the firſt were ſuperfluous; becauſe all the ſubſequent eſtates would have been equitable eſtates, and conſequently the contingent remainders would have been preſerved without the repetition of the ſame deviſe ſo often to the truſtees. And where one conſtruction is conſiſtent with the words of the will as they ſtand and another will have the effect of rendering many of the proviſions nugatory, the Court are bound to adopt the former. Upon the whole therefore the meaning is as certain as if the words "*during the life* "*of the tenant for life*" had been reſpectively inſerted after the deviſes to the truſtees and their heirs. It is true that in *Boteler* v. *Allington* (*a*), where the words "during the life of the tenant for life" were omitted after a limitation to truſtees and their heirs to preſerve contingent remainders after an eſtate for life given, the Lord Chancellor decreed a conveyance of the legal eſtate by the ſurviving truſtee to the ceſtuy que truſt after the death of the tenant for life: but that was in the caſe of a purchaſer, where the conveyance was required ex majori cautelâ, and not from any doubt of the Lord Chancellor; for his own opinion (*b*) was that the truſtee had not the legal eſtate; but his Lordſhip thought that at all events he was bound to compel the truſtee to join in the conveyance upon the prayer of him for whom the truſt, if any, was created, in order to put the matter out of doubt. In *Venables* v. *Morris* (*c*), where there was ſuch a general limitation to truſtees in fee, omitting the uſual words "during the life of the tenant for life," Lord *Kenyon* ſeemed indeed to conſider that the legal eſtate continued in the truſtees: but in that caſe there were no ſubſequent limitations, which ſhewed the intent to be otherwiſe, and in ſome events ſuch a conſtruction might be neceſſary to give effect to the power reſerved (*d*). As to the ſecond objection, reſpecting the verdict being entered on the firſt count; that depends on the queſtion, whether the fine levied by *Anthony Compere*, the tenant for life, had any operation: if it had, it muſt be admitted that an entry was neceſſary to avoid it; and then according to *Berrington* v. *Parkhurſt* (*e*) the demiſe muſt be laid after the entry.

(*a*) 1 *Bro. Ch. Caſ.* 72.

(*b*) But this does not appear in the printed report.

(*c*) *Ante* 342.

(*d*) *Vid. poſt.* 438.

(*e*) 2 *Stra.* 1086.

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entry. But the fine of a tenant for life is merely void. In *Goodright* d. *Hare* v. *Board* and *Jones* (*a*) the general principle was laid down from 9 *Rep.* 106. *a.* that a fine does not bar any eſtate in poſſeſſion, remainder, or reverſion, which is not deveſted and put to a right; and that if the party to a fine be in of a ſeiſin or poſſeſſion conſiſtent with the intereſt intended to be barred, the fine does not deveſt it, and therefore it is no bar. Now here the poſſeſſion of the tenant for life who levied the fine was conſiſtent with the eſtate of thoſe in remainder.

Erſkine, *Williams* Serjt., and *Abbott*, contrà. The queſtion is not whether it were neceſſary for the purpoſe intended by the deviſor that the truſtees ſhould have taken a fee; but the Court muſt decide upon what he has expreſſed; and he has limited the fee to them in expreſs and technical terms. There is no inſtance where the Court have cut down an expreſs deviſe in fee to an eſtate for life upon a mere implication of intent. In ſome caſes, where an eſtate has been deviſed to a man and his heirs and in default of iſſue of his body then over, the Court have ſaid that the ſubſequent words explain what kind of heirs were meant, namely, heirs of the body: but that is ſtill giving a meaning to all the words. Whereas the conſtruction propoſed here can only be made by rejecting the limitation to the heirs altogether. At any rate the Court will not adopt ſo forced a conſtruction, unleſs it be abſolutely neceſſary to carry into effect the general intent of the deviſor: but that general intent may take effect as well by giving the legal eſtate in fee to the truſtees, as by confining it to the lives of the ſeveral tenants for lives. The mere circumſtance of the deviſe in fee to truſtees being repeated ſeveral times cannot in itſelf furniſh a ground for deciding that they took a leſs eſtate in the firſt inſtance. It has often occurred in other caſes, and no ſuch argument was ever before attempted to be drawn from it. The fee was conſidered as paſſing to the truſtees in both the caſes alluded to, although the object of interpoſing truſtees was as in this caſe intended only for a particular purpoſe. And it never yet was conſidered that the duration of the eſtate to truſtees and their heirs was limited to the neceſſity of the purpoſe for which the eſtate was created. As to the ſecond point, the caſe of *Clerke* v. *Pyxell* (*b*) ſhews that an entry was neceſſary to avoid the fine in this caſe; ſo that at all events the verdict can only ſtand on the ſecond count.

(*a*) *M.* 23 *Geo.* 3. *B. R. Cruiſe on Fines* 251.

(*b*) 1 *Saund.* 319.

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Doe *againſt* Hicks.

Lord Kenyon Ch. J. I am glad to find, on looking through the whole of this will, that the truſtees did not take the abſolute fee; for though, if they had taken ſuch an eſtate, the preſent claimant who is unqueſtionably entitled to the beneficial intereſt in the eſtate would not ultimately be diſappointed, yet he would be driven to a more expenſive and circuitous mode of proceeding in order to obtain it. We are to collect the deviſor's intention from the whole will; and I agree with the plaintiff's counſel that taking the whole inſtrument together it appears that he intended that the truſtees ſhould only take during the lives of the ſeveral tenants for life in order to protect the contingent remainders, though the words during the life of the tenant for life are not inſerted in the will in the limitations to the truſtees. If he did not intend this, all the ſubſequent remainders to the truſtees were abſolutely nugatory. The doubt merely ariſes from the inaccurate penning of the will, which was evidently drawn by a perſon ignorant of the profeſſion. What I rely upon is this, that taking the ſeries of limitations all together, it appears that the deviſor thought that the whole intereſt in the eſtate was not veſted in the truſtees by the firſt limitation, becauſe he thought it neceſſary afterwards to give them the ſame eſtate after all the ſubſequent eſtates for life. The caſe of *Boteler* v. *Allington* ought not to be relied on as an authority, becauſe that was an amicable ſuit; and the bill was filed merely to remove all doubts. And with regard to that of *Venables* v. *Morris*, it is clearly diſtinguiſhable from the preſent. There I threw out an opinion that the truſtees took the abſolute fee by the ſecond limitation to them; and on further conſideration (*a*) I am now clearly of the ſame opinion. There it was abſolutely neceſſary that the fee ſhould be in the truſtees; for the tenant for life (the wife) had a power of appointment, and if in exerciſing that power ſhe had introduced any contingent remainders, they might all have been defeated if the uſes were not executed in the truſtees. On the ſame principle therefore that it was neceſſary in that caſe that the truſtees ſhould have the legal eſtate, to anſwer the intention of the parties, I think it is not neceſſary in this caſe that they ſhould take the legal eſtate for a longer term than during the lives of the tenants for lives, ſince this conſtruction will beſt anſwer the intention of this teſtator.

On the ſecond point I am inclined to yield to the defendant's objection: but it is not neceſſary to diſcuſs that point in this caſe, ſince the plaintiff is at all events entitled to a verdict on the ſecond

See post. 727. the point adjudged accordingly.

(*a*) See the next caſe.

cond count. And if the plaintiff be entitled to the mean profits antecedent to the day of the demiſe laid in that count, he may recover them notwithſtanding this verdict by proving his title before that period.

Per Curiam, Let the verdict be entered for the plaintiff on the ſecond count.

Venables and Wife *againſt* Morris and another.

By deed and fine an eſtate was limited to the uſe of the huſband for life, remainder to truſtees and their heirs during his life to preſerve contingent remainders, remainder to the wife for life, remainder to the truſtees and their heirs (not ſaying "during her life") in truſt to ſupport the contingent uſes and eſtates thereinafter limited, remainder to the firſt and other ſons in tail, remainder to the wife in tail, remainder in default of iſſue to ſuch perſons and for ſuch eſtates as ſhe ſhould appoint, &c;—held that the truſtees took a legal eſtate in fee after the determination of the wife's life eſtate, and that all the ſubſequent limitations were truſt eſtates:—held alſo that an appointment by the wife to the uſe of the right heirs of the huſband could not unite with the antecedent life eſtate of the huſband, but could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir.

The following certificate was ſent by the Court to the Lord Chancellor, in this caſe (*vide ante* 342.) "We are of opinion that the eſtate limited to *Robert Lloyd* and *Rowland Edwards*, on the determination of the life of *Hannah Morris*, was an uſe executed in them in fee (*a*); and that the appointment made by her did not create any eſtate which could unite with the life eſtate of *Sampſon Morris*, and that it could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir. And we are of opinion that neither *Randal Morris* nor *Elizabeth Venables* took any legal intereſt in the premiſes in queſtion.

Kenyon.
W. H. Aſhhurſt.
N. Groſe.
Nov. 8th, 1797. *S. Lawrence.*

(*a*) See the preceding caſe.

Wedneſday, Nov. 22d.

The King *againſt* The Inhabitants of Upwell.

A ſervant, who had been hired for a year, was beaten by her maſter 16 days before the end of the year, on which ſhe deſired him to diſmiſs her from his ſervice threatening to apply to a magiſtrate for redreſs: the maſter paid her her whole year's wages and told her ſhe might ſerve the remainder of the year; but the ſervant went away: held that the ſervant gained no ſettlement.

The *Norfolk* ſeſſions confirmed an order of two juſtices, by which *Sarah Brown* was removed from the pariſh of *Downham Market* to *Upwell*, and ſtated the following caſe for the opinion of this Court.

The

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The KING *againſt* The Inhabitants of UPWELL.

The pauper was hired at *Michaelmas* 1791 by *J. Failes* of *Upwell* for a year, and continued in his ſervice until within fifteen or ſixteen days before the following *Michaelmas*, when her maſter kicked and beat her; the pauper complained to her father of this ill-treatment, and in conjunction with her father required her maſter to diſmiſs her from his ſervice, under a threat of applying to a magiſtrate for redreſs on account of the aſſault; the maſter then paid her the whole of her wages, and told her ſhe might ſerve the remainder of the year, but the pauper refuſed ſo to do, and immediately left the ſervice.

When this caſe was called on for argument,

The Court ſaid there was no queſtion in it; for that according to the facts ſtated it muſt be conſidered as an agreement by both parties to put an end to the contract ſeveral days before the expiration of the year, and conſequently that the pauper had gained no ſettlement in *Upwell*. And that the caſe of *R.* v. *Grantham* (*a*) was deciſive of the preſent.

Per Curiam, **Both orders quaſhed.**

Mingay and *Hutton* were to have argued in ſupport of the order of ſeſſions, and *Erſkine* againſt it.

(*a*) *Ante*, 3 vol. 754.

The KING *againſt* The Sheriff of MIDDLESEX.

Wedneſday, Nov. 22d.

Affidavits to ſet aſide an attachment that has been *granted* (tho' not *iſſued*) in the courſe of a civil ſuit muſt be entitled "*R.* v. The party to be attached &c."

GIBBS having, on a former day, obtained a rule to ſhew cauſe why a writ of attachment which had been granted againſt the ſheriff in a cauſe of *Sadler* v. *Sheridan* ſhould not be ſet aſide on payment of coſts;

Marryat, on ſhewing cauſe, now objected to the reading of the affidavits in ſupport of the rule, becauſe they were entitled "The *King* againſt The Sheriff of *Middleſex*:" whereas, the attachment not having in fact *iſſued*, the affidavits ought to have been entitled in the original cauſe, according to the rule laid down in *Wood* v. *Webb*, *ante* 1 vol. 253. But

The Court ſaid that, as the attachment had been *granted*, the affidavits were properly entitled. And they directed the counſel to ſhew cauſe on the merits.

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Thurſday, Nov. 23d.

HODGSON and Another Aſſignees of EDWARD WARD a Bankrupt *againſt* LOY.

A conſignor's right of ſtopping goods in tranſitu is not taken away by the conſignee's having partly paid for the goods.

IN trover to recover the value of 138½ firkins of butter, which was tried at the laſt aſſizes for the county of *Cumberland* before *Rooke* Juſtice, a verdict was found for the plaintiffs for 322 *l.* ſubject to the opinion of the Court upon the following caſe. The plaintiffs claimed as aſſignees under a commiſſion of bankrupt againſt *Edward Ward* dated the 25th *March* 1797. In the beginning of *February*, prior to his bankruptcy, the bankrupt, who was a butter merchant reſident in *Cumberland*, purchaſed ſixty firkins of butter of one *Cowper* at 41 *s.* per firkin, and paid one halfpenny earneſt. It was originally agreed that *Ward* was to pay 40 *l.* of the purchaſe money in caſh upon the *Tueſday* ſe'nnight following the contract, and on which day the butter was to be delivered; the 40 *l.* was not paid on the day ſpecified, but on that day *Ward* purchaſed of *Cowper* 44½ other firkins of butter, making in all 104½, and *Cowper* being indebted to *Ward* in the ſum of 20 *l.* *Ward* in addition to that ſum paid him 30 *l.* more on account of the butter, and having promiſed to ſend him a bill for 100 *l.* he afterwards did ſo; but that bill when it became due was not paid. On the ſame day that the latter contract was made with *Cowper*, *Ward* purchaſed of one *Wilſon* 34 firkins of butter, and both *Cowper* and *Wilſon* agreed to deliver the butter to one *Golding* a carrier; who ſaid on his examination that he carried it on *Edward Ward*'s account to be forwarded by him to *Stockton* in its way to *London*. And at the ſame time *Ward* deſired that the butter might be marked with the initials *C. W.*, (meaning *Chriſtopher Ward* his brother in *London*,) to whom he uſually ſent his butter conſigned for ſale on his own account, and which initials the bankrupt had conſtantly uſed for ſeven years upon ſuch conſignments. The butter was accordingly delivered on the appointed day by the vendors to *Golding* the carrier, who was deſired by the bankrupt to forward the butter as uſual to one *Wilkinſon* the wharfinger uſually employed by the bankrupt at *Stockton*, to be by him ſhipped for *London*. When the butter was delivered to *Golding* the carrier, he entered it in his book and way-bill in the name of *Edward Ward*, and carried it on *Ward*'s account; and the vendors told him *Ward* was to pay the carriage. *Golding* the carrier carried the firkins as far as *Bowes*, and there delivered them to one

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one *Savage*, another carrier, who received no other inſtructions but from the way-bill, which only ſhews from whom they come, and from that he knew what to do with them. He proceeded with them to *Stockton*, and they were delivered by him to *Wilkinſon* the wharfinger, who had frequently received butter on *Ward*'s account for the purpoſe of carriage, and who had general directions from *E. Ward* to ſend to *C. Ward* in *London*. *Wilkinſon*, when he received the 138½ firkins in queſtion, underſtood that he received them on *E. Ward*'s account, and immediately on their arrival wrote a letter to *E. Ward* acknowledging the receipt of the butter, and alſo one to *C. Ward* to acquaint him of the ſame fact and of the name of the ſhip by which they were to be forwarded to *London*. Before the butter reached *London*, *C. Ward* and *E. Ward* both ſtopped payment and became bankrupts; and the defendant as agent of *Cowper* and *Wilſon* got poſſeſſion of the butter on its arrival in the River, and upon a demand made on behalf of the plaintiffs refuſed to deliver it, ſaying he was indemnified by *Cowper* and *Wilſon*, and admitting that he had ſold it for the price for which the damages are aſſeſſed. In *June* laſt *Cowper* tendered to the plaintiffs the bill for 100*l.*, which had been given by *E. Ward* to him, and the money which he had received, but the plaintiffs refuſed to receive the ſame.

Park, for the plaintiffs (*a*), admitted that where goods were bargained for, to be delivered at a diſtant place, the contract was ambulatory till the delivery; according to what was ſaid by *Aſhhurſt* J. in *Lickbarrow* v. *Maſon* (*b*). But here, he contended, that the vendor could not ſtop the goods in tranſitu. 1ſt, Becauſe there was a delivery to the vendee or his agent. 2d, Becauſe there had been a part payment for the goods. 3d, Becauſe there was an antecedent debt from the vendor to the bankrupt, for which the bankrupt had a lien in equity on the goods; and which ſum at any rate ought to have been tendered, as well as the money immediately advanced on the goods. 1ſt, The delivery of the goods to *Golding* the carrier, according to the terms of the contract, by the direction of the bankrupt was a delivery to the bankrupt himſelf. It is ſtated in the caſe that *Golding* received them *on the bankrupt's account*. In order to defeat the vendor's right of ſtopping in tranſitu it is not neceſſary, as was holden in *Ellis* v. *Hunt* (*c*), that the goods ſhould come into the actual poſſeſſion of the vendee.

(*a*) On a former day in this Term.

(*b*) *Ante*, 2 vol 71.

(*c*) *Ante*, 3 vol. 464.

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dee. That caſe turned on the fact of the proviſional aſſignee under the vendee's commiſſion having taken poſſeſſion of the goods while in the warehouſe of the inn where the carrier put up by fixing his mark upon them. Now here the bankrupt's mark was upon the goods at the time they were delivered to *Golding* as his ſpecial agent. It was holden in the preſent Term, upon a motion for a new trial in a caſe of *Fowler* and another aſſignees of *Hunter* and Co. v. *M'Taggart* and Co., tried before *Groſe* J. at *Briſtol*, that a delivery of goods into a ſhip chartered by the vendee, who afterwards became a bankrupt, was a delivery to him, ſo as to defeat the vendor's right to ſtop in tranſitu; though it might as well have been contended there that the delivery was only for the purpoſe of conveyance to the place of their deſtination. But further there was a delivery of the goods by the particular direction of the bankrupt to *Wilkinſon* at *Stockton*, who (the caſe ſtates) *was uſually employed by the bankrupt*, and who was acting under general inſtructions from him to receive ſuch goods and forward them to his brother in *London*. Therefore ſuppoſing that the poſſeſſion of *Golding* in the firſt inſtance might be conſidered as common to both the parties, yet *Wilkinſon* to whom a ſpecial delivery was made by the order of the bankrupt cannot be conſidered as a common agent between them: and that diſtinguiſhes this caſe from others which may be cited. 2dly, Here is a part payment, in which caſe the right of ſtopping in tranſitu cannot attach at all. For it is clear that the vendor can have no right to reclaim ſuch part of the goods for which he has actually received the value; and as the contract is entire, no apportionment can be made, and therefore the part payment muſt be binding upon the whole, and cannot be applied to any ſpecific parcel. Beſides, the vendors have ſeized the whole. After goods have been ſold, though the vendors are not bound to accept leſs than the full value, yet if they agree to accept a part payment, the contract can only be reſcinded by mutual conſent: ſomething is required to be done by both parties for that purpoſe, namely, the redelivery of the goods on one ſide, and the repayment of the money advanced on the other. The fact of a part payment has been conſidered as excepting the caſe out of the general right of ſtopping in tranſitu. In *Wiſeman* v. *Vandeput* (*a*), which was the firſt caſe in Chancery of the kind, the rule was laid down that the vendors might ſtop in tranſitu, *the vendees having paid no money for the*

(*a*) 2 *Vern* 203.

goods.

goods. So in the caſe of the aſſignees of *Burghall* v. *Howard* (*a*) Lord *Mansfield* ſaid that he had known it ſeveral times ruled in Chancery, that where the conſignee becomes a bankrupt, *and no part of the price has been paid*, the conſignor may ſeize the goods before they come into the hands of the conſignee. 3dly, Suppoſing the right of ſtopping in tranſitu ſtill to remain in the vendor, yet the right itſelf being founded on equitable principles muſt be exerciſed according to the juſtice of the particular caſe, which cannot be done without putting the vendee in the ſame ſituation as he would have been in ſuppoſing he had continued ſolvent; in which caſe, in the preſent inſtance, beſides ſetting off the money already paid on the goods he would have a right to ſet off the antecedent debt due to him from one of the vendors to the amount of 20 *l.*, of which ſum a tender ought alſo to have been made; and for which he had a lien in equity on the goods. In *Wiſeman* v. *Vandeput* (*b*) the Court, in decreeing for the vendor's right to ſtop in tranſitu, alſo decreed that an account ſhould be taken if any thing were due from them to the vendees, and if ſo, that that ſhould firſt be paid to them.

Chambre contrà. 1ſt, Here was no ſuch delivery to the bankrupt as was ſufficient to deveſt the vendor's right to ſtop in tranſitu. The delivery to *Golding* in the firſt inſtance, and afterwards that by him to *Savage*, and by *Savage* to *Wilkinſon*, were all deliveries made to them in the capacity of common carriers, and not as private agents of the bankrupt. They were reſpectively made for the purpoſe of forwarding the goods and for no other purpoſe. The circumſtance of the bankrupt's deſiring *Golding* to carry the goods to *Wilkinſon* as uſual cannot vary the nature of the agency. It was only in affirmation of the purpoſe for which the vendors had before made the delivery to *Golding*. Suppoſing this converſation even to amount to the appointment of *Wilkinſon* as a ſpecial carrier named by the vendee, that would not alter the vendor's right to ſtop in tranſitu. In *Ellis* v. *Hunt* (*c*) *Buller* J. expreſsly ſaid that that would make no difference; and *Stokes* v. *La Riviere* (*a*) there cited was a caſe of delivery to a particular carrier. Still leſs can the conception of the carrier that he received goods on account of the vendee alter the law, and convert him into a ſpecial agent for that purpoſe. Then the mark on the goods

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(*a*) Sittings at *Guildhall* after *Hilary* 32 *Geo.* 2. 1 *H. Blac.* 365, 6. *n.*

(*b*) 2 *Vern.* 204.

(*c*) *Ante,* 3 vol. 469.

(*d*) Sittings at *Guildhall* after *Mich.* 1784, cor. Lord *Mansfield*, *ante*, 3 vol. 466.

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which is relied on was not for the purpoſe of taking poſſeſſion of them, as in *Ellis* v. *Hunt*, but merely as a direction to aſcertain to whom they were to be ſent. The caſe of *Hunter* and others aſſignees of *Blanchard* and *Lewis* v. *Beale* (*a*) is much ſtronger than the preſent; for there the bankrupt (vendee) had directed the innkeeper at the place where the goods were ſent to forward them down to the quay in order to their being ſhipped, which was accordingly done, but arriving too late they were ſent back to the inn, after which the vendee's ſervant went to the warehouſe and gave particular directions what ſhould be done with the goods till another opportunity of ſhipping them offered. In that caſe therefore acts of ownerſhip were exerciſed by the vendee over the goods after they had arrived at the place of their deſtination; notwithſtanding which, as they ſtill remained in the actual poſſeſſion of the innkeeper, who was the locum tenens of the carrier, Lord *Mansfield* held that they might be ſtopped in tranſitu. 2dly, It has never been decided that part payment made any difference in caſes of this kind; nor is it reaſonable that it ſhould; for then ſome trifling ſum by way of earneſt would always be paid to prevent the legal right of the vendor attaching. The foundation of that right is that the vendor has a juſt lien on his goods for the full value of them until they are actually delivered to the vendee. The only operation of a partial payment is to leſſen that lien pro tanto. Therefore till the delivery the vendor may, upon the inſolvency of the vendee, retake his goods upon their paſſage upon repayment of the ſum ſo advanced. In ſome of the caſes determined the conſignee had inſured the goods, in others he had given his acceptances, which might be conſidered as payment till they became due and were diſhonored. The paſſages alluded to were neither deciſions nor even direct opinions on the point, but mere obſervations arguendo that no payment had been made on the goods. Here the vendors have elected to retake their goods, and have tendered the money paid in part for them and alſo the bill which was diſhonored. 3dly, As to the tender of the prior debt due, no queſtion was made on that head before: but on no principle of law can that be neceſſary; for it made no part of the contract for theſe goods, and the vendee cannot acquire any general lien on goods before he has actually received them.

(*a*) Sittings after *Trinity* 1785 at *Guildhall*, cor. Lord *Mansfield*, cited in *Ellis* v. *Hunt*, *ante*, 3 vol. 466.

Park in reply obſerved that this was diſtinguiſhable from the common caſe of a delivery to a carrier, becauſe here it was part of the original agreement that the goods ſhould be delivered to *Golding*. The acts of the bankrupt afterwards ſhewed that he conſidered *Golding* as his ſpecial agent; for he gave particular directions to him in what manner the goods ſhould be forwarded, which *Golding* obeyed, conſidering himſelf as the bankrupt's ſpecial ſervant. With reſpect to *Hunter* v. *Beal*, it differed in this, that there the goods were ſent to a perſon in *London* of the vendor's own chooſing; and though the bankrupt afterwards gave directions to that perſon where to ſend the goods, yet they were never out of his poſſeſſion till they were retaken by the vendor. Whereas here they got into the hands of a perſon who was not only the general, but in this caſe the appointed, agent of the vendee.

After this caſe was argued

Lord Kenyon Ch. J. ſaid that on the general queſtion reſpecting the right of the vendors to ſtop theſe goods in tranſitu no doubt could be entertained, for that this caſe could not be diſtinguiſhed from thoſe cited in which that doctrine had been eſtabliſhed and recognized. And that the caſe of *Hunter* v. *Beal* was much ſtronger than the preſent. But, on the other point reſpecting payment, his Lordſhip ſaid he did not think that this took the caſe out of the general rule, and that he ſhould be ſorry to let in ſuch an exception becauſe it would deſtroy the rule itſelf; ſince every payment however ſmall, even the payment of a farthing by way of earneſt, would, if ſuch an exception were introduced, prevent the operation of the general rule of ſtopping in tranſitu. And he added that the right of the vendor to ſtop goods in tranſitu in caſe of the inſolvency of the vendee was a kind of equitable lien adopted by the law for the purpoſes of ſubſtantial juſtice, and that it did not proceed, as the plaintiff's counſel ſuppoſed, on the ground of reſcinding the contract.

The other judges however expreſſing a wiſh to have an opportunity of examining the caſes cited in order to ſee whether the circumſtance of part payment by the vendee took this caſe out of the general rule: and being deſirous that there ſhould be an uniformity of deciſions on this ſubject, a ſecond argument was ordered on this ſecond point; the Court being unanimous on the firſt. But on this day

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Lord KENYON Ch. J. delivered the opinion of the Court in favour of the defendant, in ſubſtance, as follows—We have looked into the caſes cited on the ſecond point reſpecting the part payment of the goods by the vendee; and as this is a caſe of great conſequence to the commercial world, and as it is of vaſt importance that queſtions that have been long ſettled ſhould not be ſet afloat again on account of ſome trivial circumſtance that formed no ingredient in ſome of the deciſions in which the general doctrine was eſtabliſhed, and as we have no doubt ourſelves on this ſubject, we think that the caſe ſhould not be argued again. When the diſtinction was firſt taken at the bar, I thought it not well founded; and on looking into the caſes that were referred to in ſupport of it, we are clearly of opinion that the circumſtance of the vendee having partly paid for the goods does not defeat the vendor's right to ſtop them in tranſitu, the vendee having become a bankrupt; and that the vendor has a right to retake them unleſs the whole price has been paid. And indeed the Lords Commiſſioners ſeem to have been of the ſame opinion in the caſe of *Wiſeman* v. *Vandeput*; for "they decreed an account that if any thing were due from the Italians (the conſignors) to the *Bonnells* (the conſignees) that ſhould be paid to the plaintiffs, but they ſhould not have the value of the ſilks by virtue of the conſignment." Therefore we would not have it ſuppoſed that there is any doubt on this queſtion. The conſequence is that the poſtea muſt be delivered to the defendant.

Poſtea to the defendant (*a*).

(*a*) He agreeing to repay the money paid by the bankrupt.

BLACKMORE *againſt* FLEMYNG.

Friday, Nov. 24th.

After judgment by default in an action of debt on a judgment the plaintiff may ſue out a writ of inquiry.

TO this action of debt, which was brought on a judgment of ſeventeen years ſtanding, the defendant ſuffered judgment by default. And the plaintiff having ſued out a writ of inquiry of damages,

Wood, on a former day in this term, moved on the part of the defendant to ſtay the proceedings on the writ of inquiry, contending that ſuch a proceeding was irregular and oppreſſive on the defendant.

The Court then expreſſed a ſtrong opinion againſt the motion; ſaying that there appeared to be no irregularity or oppreſſion in the

the plaintiff's proceedings. That the plaintiff was damnified by reaſon of the debt having been withheld from him ſo many years, and that he had a right to damages for that detention. That if no damages at all were given, the plaintiff would not be entitled to his coſts under the ſtatute of *Glouceſter*. However they gave the defendant leave to renew this application, if any authority could be found to warrant it.

Wood accordingly now renewed his motion, and mentioned the caſe of *Roo* v. *Apſley* (*a*), where after judgment by default in an action of debt on a judgment the Court at firſt thought that the plaintiff was not entitled to intereſt in the ſhape of damages, though afterwards it was referred to the ſecondary to tax the damages.

Lawrence J. referred to the caſe of *Holdipp* v. *Otway* (*b*), where after judgment by default in an action of debt on bond it was referred to the prothonotary to tax intereſt by way of damages, and this was holden to be no objection on error, the Court ſaying that it was with the plaintiff's conſent; but if the plaintiff would not conſent then he ſhould have a writ of inquiry of damages (*c*); but this was in the election of the plaintiff and not of the defendant. And he added that by the plaintiff's having ſued out a writ of inquiry in this caſe he had made his election. So

Per Curiam, The rule was refuſed (*d*).

(*a*) 2 *Sid.* 442.

(*b*) 2 *Saund.* 107.

(*c*) On this day the writ of inquiry was executed in this caſe, and the jury gave intereſt by way of damages.

(*d*) This cauſe had before given riſe to ſeveral other motions. The declaration was delivered in *Eaſter* term laſt; the defendant pleaded nul tiel record, and a plea of ſatisfaction; upon the day given to produce the record it appeared that in the former cauſe the defendant was ſued as the Right Honourable *Hamilton Flemyng* Earl of *Wigtown*, having privilege of peerage; in this action he was called *Hamilton Flemyng* Eſq. commonly called Earl of *Wigtown*, without noticing that the firſt action was againſt him as a peer; the Court held this to be a failure of record, and in *Eaſter* term gave leave to the plaintiff to amend his declaration on payment of coſts, and the defendant to be at liberty to plead de novo. The declaration was accordingly amended and the coſts paid in the vacation, and the declaration was delivered intitled of *Eaſter* term, with notice to plead in the firſt four days of *Trinity* term; within that time the defendant pleaded his peerage in abatement, but the plea was intitled of *Trinity term*; the plaintiff treated the plea as a nullity, and ſigned judgment.—A rule was then obtained calling on the plaintiff to ſhew cauſe why the judgment ſhould not be ſet aſide, which rule was, after cauſe ſhewn, diſcharged by the Court, who ſaid that the defendant could not plead in abatement in the next term without a ſpecial imparlance. See *Doughty* v. *Laſcelles*, *ante*, 4 vol. 520; and *Buddle* v. *Wilſon*, *ante*, 6 vol. 369. *Erſkine*, *Wood*, and *Barrow*, in ſupport of the rule; *Conſt* and *Abbott* againſt it.

Saturday, Nov. 25th.

CATMUR *againſt* Sir E. KNATCHBULL, Bart. and Others.

The Court will not grant an attachment againſt a member of parliament for non-payment of money according to an award.

ON an objection taken by the defendant's counſel, it was admitted by the other ſide, and ruled by

The Court, that an attachment could not be granted againſt the defendant, who was a member of the Houſe of Commons (*a*), for non-payment of a ſum of money under an award. The rule for an attachment againſt him was accordingly diſcharged.

Mingay in ſupport of the rule. *Garrow* againſt it.

(*a*) *Vid. Walker* v. The Earl of *Groſvenor*, *ante* 171, where the Court ſaid that ſuch an attachment could not be granted againſt a Peer.

Monday, Nov. 27th.

HARPER *againſt* CARR.

To entitle a defendant (an officer) to double coſts under the ſtatute 7 *Jac.* 1. *c.* 5. there muſt be a certificate of the judge who tried the cauſe (which may be granted either at the trial or afterwards,) that the defendant was ſuch an officer, and that the action was brought againſt him for ſomething done by him in the execution of that office.

THIS was an action of treſpaſs againſt the defendant for taking an anchor as a diſtreſs for non-payment of the poor-rate, in which the plaintiff was nonſuited becauſe the magiſtrates who granted the warrant of diſtreſs to the defendant as one of the churchwardens were not made defendants. [*Vid. ſup.* 270.]

Lambe on a former day moved on the part of the defendant for a rule to ſhew cauſe why a ſuggeſtion ſhould not be entered on the record that the defendant was a churchwarden, and that the action was brought againſt him for what he had done in the execution of that office, in order to entitle him to double coſts. And he mentioned the caſe of *Bennet* v. *Hart*, 1 *Conſt*'s *Bott* 289. where after a verdict for the defendant in an action brought againſt him for an act done by him as overſeer of the poor under the ſtat. 43 *Eliz. c.* 2. *Deniſon* J. ſaid that a ſuggeſtion ſhould be entered on the poſtea that the defendant was an overſeer of the poor, and that the action was brought againſt him for a thing done by virtue of the ſtat. 43 *Eliz. c.* 2.

Law, in ſhewing caſe againſt that rule, relied on an anonymous caſe in 2 *Ventr.* 45, the caſe of *Grindby* v. *Holloway*, *Dougl.* 307, and on the words of the ſtat. 7 *Jac.* 1. *c.* 5. (*a*), to ſhew that this

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(*a*) The firſt ſection of that ſtatute (which is extended by ſtat. 21 *Jac.* 1. *c.* 12. to churchwardens and overſeers) enacts that if a verdict ſhall paſs with the defendant, or the plaintiff become nonſuit, or ſuffer any diſcontinuance, "in every ſuch caſe the juſtice or juſtices or ſuch other judge *before whom the ſaid matter ſhall be tried* ſhall by force of that act allow to the defendant or defendants his or their double coſts" &c.

HARPER *againſt* CARR.

was not the proper mode of obtaining the relief prayed for by the defendant, and that he could not be entitled to double coſts without a certificate from the judge who tried the cauſe. He alſo obſerved that the words of the ſtat. 7 *Jac.* 1. *c.* 5., are different from thoſe of the ſtat. 43 *El.* *c.* 2. on which the caſe of *Bennet* v. *Hart* depended; for by the expreſs words of the ſtat. of *Elizabeth* the *jury* who aſſeſs the treble damages are alſo to aſſeſs the coſts.

The Court were of that opinion; recommending an application to the judge for a certificate; adding that they thought the judge was bound to grant it (*a*), and that it was not neceſſary that it ſhould be granted at the trial, as was holden in *Swinnerton* v. *Jervis* (*b*) on the conſtruction of the ſtat. 8 & 9 *W.* 3. *c.* 11. *ſ.* 4. reſpecting a certificate that a treſpaſs was wilful.

Rule diſcharged.

(*a*) The learned judge has ſince certified.

(*b*) *Ante*, 5 vol. 12.

ALEXANDER *againſt* BISS.

Monday, Nov. 27th.

It is not neceſſary to give bail in error on a judgment in debt for goods ſold and delivered and on an account ſtated.

JUDGMENT in this action, which was debt for goods ſold and delivered, and on an account ſtated, was ſigned in *Trinity* term laſt; on the 10th of *July* a writ of error was allowed and ſerved; on the 17th of *July* the defendant was taken in execution for 38*l.* the amount of the damages, on which he paid that ſum to obtain his diſcharge; and afterwards obtained a rule calling on the plaintiff to ſhew cauſe why the writ of capias ad ſatisfaciendum and the ſubſequent proceedings ſhould not be ſet aſide for irregularity, and why the ſum of 38*l.* paid into the hands of the ſheriff of *Middleſex* ſhould not be returned to the defendant. The queſtion was whether under the ſtat. 3 *Jac.* 1. *c.* 8. *ſ.* 1. (*a*) it was neceſſary for the defendant to put in bail in error.

Marryat, on a former day in this term, in ſhewing cauſe againſt this rule, contended that bail in error ſhould have been put in, and for the want of it the proceedings on the part of the plaintiff by ſuing out a writ of execution after the allowance of the writ of error were regular. That the words of the ſtatute were general,

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(*a*) That ſtatute enacts that no execution ſhall be ſtayed or delayed by any writ of error for reverſing any judgment "in any action or bill of debt upon any ſingle bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or *upon any contract*," unleſs the plaintiff in error put in bail, &c.

"debt upon *any* contract;" and that this was an action on a contract; for in *Emery* v. *Fell* (*a*), where to debt for goods ſold and delivered the defendant ſpecially demurred becauſe no contract was alleged, the Court overruled the objection, ſaying that the words "ſold and delivered" implied a contract.

Lawes, in ſupport of the rule, inſiſted that the ſtat. 3 *Jac.* 1. did not extend to ſuch a caſe as the preſent, where there was no preciſe ſum due from the defendant before the action was brought; and that the word "contract" in the act meant an expreſs contract, not ſuch an one as is implied by law. But that even if this caſe would have been within the ſtatute had there been only the count for goods ſold and delivered, the addition of the other count took it out of the act. For in *Girling* v. *Baker*, *Yelv.* 227., reported in 2 *Bulſtr.* 53. by the name of *Gilling* v. *Baker*, it was ruled that in an action of debt on an inſimul computaſſet it was not neceſſary to give bail in error; and the ſame point was decided in *Garret* v. *Dandy* (*b*) in an action of debt on a bottomree bond (*c*) to pay a ſum of money *and alſo to perform certain covenants* contained in a writing of the ſame date.

The Court took time to conſider of this point; and now

Lord KENYON Ch. J. ſaid, we have looked into the caſes referred to, which are deciſive of the preſent queſtion; and on the authority of thoſe caſes we are of opinion that this caſe is not within the ſtat. 3 *Jac.* 1., and that there was no occaſion to give bail in error. The conſequence of which is that the proceedings after the allowance of the writ of error are irregular, and the rule muſt be made abſolute.

LAWRENCE J. added that there was another caſe in *Strange* (*d*) to the ſame effect.

Per Curiam, Rule abſolute (*e*).

(*a*) *Ante*, 2 vol. 28.

(*b*) 1 *Show.* 14.

(*c*) But on error in an action on a bottomree bond *to pay money only* there muſt be bail. *Pitt* v. *Coney*, 1 *Str.* 476.

(*d*) *Vid. Thrale* v. *Vaughan*, 2 *Str.* 1190., and 1 *Wilſ.* 19. where it was holden that no bail was neceſſary in error on a bond conditioned to pay for whatever beer the plaintiff furniſhed for the cellar of a third perſon.

(*e*) See *Chauvet* v. *Afray*, 2 *Burr.* 746., where it was decided that a bond given by a third perſon for payment of a ſum certain by inſtalments was a caſe within the ſtat. 3 *Jac.* 1.

1797.

Monday, Nov. 27th.

KENNET and AVON CANAL Company *againſt* JONES.

It is no objection to an affidavit to hold to bail that it is not entitled "in the King's Bench;" or that it appears to have been taken before "*A. B.* a commiſſioner &c." without adding "of the Court of *B. R.*," if in fact he were a commiſſioner of that Court.

LAWES moved on a former day to diſcharge the recognizance of bail on account of two objections appearing on the face of the affidavit on which the defendant had been holden to bail; 1ſt, Becauſe the affidavit was not entitled "in the King's Bench;" 2dly, Becauſe it only appeared to have been taken before "*Thomas Merriman* a commiſſioner" &c, without ſaying by what court he was commiſſioned to take affidavits.

Praed now ſhewed cauſe againſt that rule. If the affidavit be merely informal, the defendant is now precluded from objecting to it, he having taken the declaration out of the office. But on examination it will not be found that there is any informality in the affidavit. No reaſon can be given for requiring that the words "in the King's Bench" ſhould be prefixed by way of title to ſuch an affidavit, for it is not ſworn in court, and no action is depending in court when the affidavit is made. Though in the books of practice this part of the title is inſerted in ſome precedents, it is omitted in others. 1 *Inſtr. Cleric.* 46, 221; *Lill. Entr.* 612.; 1 *Richard's Pract.* 120. It does not form any part of the affidavit itſelf: and the ſtat. 12 *Geo.* 1. only requires a poſitive affidavit of the debt. Nor is there any weight in the other objection relative to the jurat, the perſon before whom the affidavit was taken (*a*) being commiſſioned by this Court to take affidavits; though it would have been objectionable if in point of fact he had had no commiſſion from this Court. This affidavit in its preſent form is ſufficient for the purpoſe of holding the defendant to bail. It contains a poſitive oath of the debt; and if it be not true, the party making it may be indicted for perjury, for it may be alleged that he came before *T. Merriman* who was then commiſſioned to take affidavits in this court, and that he then and there depoſed ſo and ſo in the affidavit, with an intent to commence and proſecute an action againſt the defendant for the ſaid cauſe of action, and that the ſaid affidavit was afterwards uſed for that purpoſe.

The Court were at firſt inclined to diſcharge the rule on the former ground only: but afterwards they ſaid they were ſatisfied

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(*a*) This was verified by an affidavit produced on ſhewing cauſe.

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KENNET Canal Company *againſt* JONES.

that the objections to the affidavit were unfounded, as the affidavit was poſitive with regard to the debt, and as an indictment for perjury might be framed on it if the contents were not true.

Rule diſcharged.

Tueſday Nov. 28th.

The KING *againſt* The Sheriff of SURRY.

The ſheriff having returned cepi corpus to a bailable writ in *Hilary* term laſt upon which the plaintiff proceeded no farther till this term, the Court thought it unreaſonable that the ſheriff ſhould be called upon to bring in the body after ſuch delay, and they ſet aſide an attachment which had iſſued againſt him for not doing it.

A Latitat was ſued out on the 29th of *November* 1796, directed to the late ſheriff of *Surry*, againſt *Hearding*, at the ſuit of *Andrew*, indorſed for bail for 63*l.* 5*s.*, returnable the 23d of *January* 1797, on which a warrant was granted, the defendant was arreſted, and a bail-bond given. On the 24th of *January* laſt the late ſheriff was ſerved with a rule to return the writ, and on the 30th of *January* he returned cepi corpus. After that time no proceedings were had until this term, when the late ſheriff was ruled to bring in the body, for not returning which an attachment was iſſued againſt him.

Garrow, on a former day in this term, moved to ſet aſide this attachment, contending that as no proceedings were had from the 30th of *January* laſt until this term, and no notice given to the ſheriff in the mean time, the ſheriff ought not now to be called upon, when both the bail were inſolvent and the defendant abſconded, (as appeared by an affidavit.)

Abbott now ſhewed cauſe againſt this rule, arguing that the plaintiff might now have proceeded againſt the defendant himſelf, and that there was no ſtatute, rule of court, or authority, to prevent the plaintiff ſuing the ſheriff within the ſame time. But

The Court ſaid, that, though there was no decided caſe on this ſubject, it was highly unreaſonable that the ſheriff ſhould be called upon at this diſtance of time, when the bail and the defendant were become inſolvent. And they made the

Rule abſolute.

WORTHINGTON and Others *againſt* BARLOW Adminiſtratrix.

Tueſday. Nov. 28th.

If an arbitrator, under a reference between *A.* and *B.* adminiſtrator, award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-payment.

WIGLEY having moved for an attachment againſt the defendant for not paying the ſum of 2664*l.* 13*s.* 8*l.* according to an award, in which the arbitrator had aſcertained the amount of the plaintiff's demand, as above, and directed the defendant to pay it,

Hughes ſhewed cauſe againſt the rule, on this ground, that the adminiſtratrix had no aſſets, and that the ſubmiſſion to an award by an adminiſtrator was not an admiſſion of aſſets, as was ſaid in *Pearſon* v. *Henry*, *ante*, 5 vol. 6.

Lord KENYON Ch. J. The deciſion in *Pearſon* v. *Henry* muſt be taken with reference to the facts of that caſe. There the arbitrator only aſcertained the amount of the demand, without ordering the adminiſtrator to pay it: but here the arbitrator has awarded that the defendant, the adminiſtratrix, ſhall pay the plaintiff's demand. The ſubmiſſion to arbitration by the adminiſtratrix was a reference not only of the cauſe of action but alſo of the other queſtion whether or not the adminiſtratrix had aſſets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between theſe parties that the adminiſtratrix had aſſets to pay this debt. The defendant therefore is concluded by this award, though it will not operate as an admiſſion of aſſets in any other action to be brought by any other creditor.

Rule abſolute.

MVSEVM BRITANNICVM

REGULA GENERALIS.

Hil. 37 *Geo.* 3.

IT IS ORDERED That inſolvent debtors petitioning under the Lords' Act, 32 *Geo.* 2. and ſubſequent acts for their further relief ſhall be brought into court during term time upon *Mondays* and *Thurſdays*, and upon no other days.

REGULA GENERALIS.

Trin. 37 *Geo.* 3.

IT IS ORDERED That from and after the laſt day of this term affidavits of any cauſe of action before proceſs ſued out to hold defendants to bail be not entitled in any cauſe, nor read if filed (*a*).

(*a*) *Vid. ante* 321.

REGULA GENERALIS.

Mich. 38 *Geo.* 3.

IT IS ORDERED That from and after the laſt day of this term all ſpecial caſes to be ſet down by the clerk of the papers to be argued ſhall be entered within the four firſt days of the term next after the trial at which ſuch ſpecial caſes ſhall have been reſerved; AND FURTHER that ſuch ſpecial caſes ſhall never be ſet down for argument on any of the four laſt days of the term.

THE END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

GREATHEAD *againſt* BROMLEY.

Thurſday, Jan. 25th.

Where upon a ſummary application to ſet aſide an annuity for non-compliance with the requiſites of the 17 *Geo.* 3. *c.* 26. the rule was diſcharged upon diſcuſſion of the merits, the Court will not entertain a ſimilar application between the ſame parties on the ſame ſtate of facts, though grounded upon a new objection to the annuity, which was not before urged or conſidered.

A RULE had been obtained in the laſt Term, calling on the plaintiff to ſhew cauſe why a bond and warrant of attorney for ſecuring an annuity ſhould not be ſet aſide, on the ground that certain requiſites of the 17 *Geo.* 3. *c.* 26. had not been complied with. This matter ſtood in the peremptory paper for this day: but when it was called on,

Garrow and *Gibbs* made a preliminary objection to the diſcuſſion of the merits, becauſe they had been inveſtigated a few years ago upon a ſimilar rule between theſe parties, upon the ſame ſtate of facts then exiſting, when the Court having heard every objection which was then urged diſcharged the rule with coſts. And the former proceedings on the files of the court were referred to in ſupport of the objection.

Erſkine and *Plowden*, in ſupport of the rule, admitted that ſuch an application was made; but ſtated that they had objections to offer now, which were not then entered into, and which were fatal to the annuity under the act of parliament. But

GREATHEAD *againſt* BROMLEY.

Lord KENYON Ch. J. ſaid, the act of parliament gives a ſummary juriſdiction to the Court, which is to be exerciſed according to ſound legal diſcretion; and we cannot govern our diſcretion better than by analogy to the proceedings at common law. Now if an action be brought, and the merits of the queſtion diſcuſſed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvaſs the ſame queſtion again in another action, although perhaps ſome objection or argument might have been urged upon the firſt trial, which would have led to a different judgment. So here, as it appears that all the facts now brought forward in the affidavits in ſupport of the rule exiſted at the time of the former rule, and every objection which can now be urged might then have been brought forward, the matter muſt now be taken to have paſſed in rem judicatam, and the former deciſion is concluſive between the parties.

Per Curiam, Rule diſcharged.

Thurſday, Jan. 25th.

Ex parte JOHN HILL, one, &c.

The Stat. 2 *Geo.* 2. *c.* 23., requiring (as a previous qualification to being admitted as an attorney) that the party ſhall *continue in the ſervice* of the attorney to whom he is articled for five years, is not complied with by the clerk ſerving part of the time with another attorney with his maſter's conſent, and the reſt of the time with his maſter.

AN application was made to ſtrike *John Hill* off the Roll of attornies of this Court, on the ground of his not having ſerved the regular time of five years as an articled clerk with an attorney previous to his admiſſion in *Hilary* term 1796.

Upon ſhewing cauſe the facts appeared to be theſe: Previous to the year 1791 he ſerved as a writer to *Thomas Webb* an attorney, living at *Birmingham*, to whom he applied to be articled and was refuſed. Upon which in *January* 1791 he articled himſelf to *Hughes* an attorney, who then lived ſeven miles from that town; but as *Hughes* was about removing thither, and as moſt of his buſineſs lay there, it was conſidered more convenient for *Hill* to remain where he was till *Hughes* ſettled at *Birmingham;* which *Hill* accordingly did, and continued to write for *Webb* for ten months after he was ſo articled to *Hughes*. But during that time he did attorney's buſineſs for *Hughes* from time to time in *Birmingham*, whither *Hughes* frequently went, and in particular *Hill* ſued out proceſs for him on ſeveral occaſions out of the county court. And at the end of the ten months, when *Hughes* removed to *Birmingham*, *Hill* went and reſided with him altogether.

Erſkine and *Park* ſhewed cauſe againſt the rule.

Clarke in ſupport of it was ſtopped by the Court.

Lord

Lord KENYON Ch. J. The queſtion before us is whether, on the facts diſcloſed to the Court, *Hill* has complied with the requiſites of the act of the 2 *Geo.* 2. *c.* 23., which prohibits any perſon to be admitted an attorney, unleſs he ſhall have been bound by contract in writing to ſerve as a clerk to an attorney for five years, and ſhall have continued in ſuch ſervice for the ſaid term of five years. Now if this kind of ſervice were deemed ſufficient within the act, why might not a ſervice with a perſon of any other occupation, by the conſent of the maſter to whom he was articled, be deemed ſufficient? It is true that in the preſent caſe *Hill* might have been improving himſelf as much in his profeſſion by ſerving Mr. *Webb* as if he had ſerved his own maſter: but the queſtion is, whether he has complied with the directions of the act, requiring him *to ſerve the perſon to whom he is bound, and to continue in ſuch ſervice for five years?*—And how can he be ſaid to have done ſo during ten months of the time, when he was ſerving another perſon at the diſtance of ſeven miles? It is not enough to ſay that during that time he occaſionally did buſineſs for *Hughes*, or attended the hundred court, which is holden once in three weeks. However hard the caſe may preſs on this individual, we muſt not make the law bend to our wiſhes, but muſt ſee that there has been ſuch a ſervice as the act requires. But that does not appear to have been performed in this inſtance. The main part of his buſineſs during the firſt ten months was done in another man's ſervice, and not in the ſervice of the maſter to whom he was articled.

ASHHURST J. It is not fit that we ſhould relax the rule of ſervice required by the act; the plain meaning of which was, that the clerk ſhould continue ſerving his maſter the whole time of probation required. If we break through that rule in one inſtance, I do not know what other line can be drawn, or where we are to ſtop.

GROSE J. The queſtion is, whether this perſon has ſerved his maſter for five years previous to his admiſſion, within the meaning of the act? Now can he be ſaid to have done ſo, when he was ſerving another maſter part of that time? Under theſe circumſtances I do not ſee how the party could conſcientiouſly have taken the oath required.

LAWRENCE J. The object of the act was to prevent the admiſſion of unfit perſons to be attornies; for which purpoſe it required that they ſhould ſerve the maſters to whom they were

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Ex parte JOHN HILL.

articled for five years. Now if it were ſufficient to ſerve any other perſon during that time, provided it were with the conſent of the maſter, the object of the act would be defeated. This is very much like a caſe which lately (*a*) came before the Court from *Penzance* upon a ſimilar queſtion. There an attempt was made to ſupport a ſervice with an attorney, by ſhewing that the party who lived in *Penzance*, at a diſtance from the attorney, had occaſionally done his buſineſs for him there in the county court; but the Court held that was not ſufficient.

Rule abſolute (*b*).

(*a*) In *Michaelmas* Term laſt, Ex parte *Thomas*.

(*b*) The 22 *Geo.* 2. *c.* 46. *ſ.* 8. expreſsly requires that every perſon who ſhall become bound, &c. ſhall during the whole time or term of ſervice continue and be actually employed by ſuch attorney or ſolicitor, or his or their agent or agents, in the proper buſineſs of an attorney or ſolicitor.

Friday, Jan. 26th.

HOLMES and others Aſſignees of BROOK, a Bankrupt, *againſt* WALSH.

By the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 11. & 12. and 5 *Geo.* 2. *c.* 30. *ſ.* 29. after any perſon has been convicted on an indictment for falſly ſwearing to a debt under a commiſſion of bankrupt, (on which indictment he is to ſuffer the puniſhment inflicted by the ſeveral ſtatutes againſt perjury,) the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to *in an action*; in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging that the defendant did take ſuch falſe oath.

In ſuch an action the defendant cannot take advantage of any defect in the judgment on the indictment; that can only be done on a writ of error.

THIS was an action of debt brought on the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 29. againſt the defendant to recover 2283*l.* 15*s.* being double the amount of the ſum which he ſwore was due to him under *Brook*'s commiſſion.

The plaintiffs, who deſcribed themſelves as aſſignees of *Brook*, ſued "as well for themſelves, being creditors, as for other creditors ſeeking relief under the ſaid commiſſion." The declaration ſtated that the defendant was indicted at the Spring *York* Aſſizes 1795 for perjury, in ſwearing to this debt before the commiſſioners under *Brook*'s commiſſion, (ſetting forth the indictment at large,) on which he was convicted at the Spring *York* Aſſizes 1796, when it was ordered and adjudged by the Court there that he ſhould be impriſoned for two years and ſet in the pillory at *Halifax* on a given day within that time; by reaſon of which premiſes and by force of the ſtatute, &c. an action had accrued to the plaintiffs as aſſignees to demand and have of and from the defendant, to be equally divided among all the creditors ſeeking relief under the ſaid commiſſion, the ſaid ſum," &c.

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To this there was a ſpecial demurrer, aſſigning for cauſe that it was not directly and poſitively ſtated in the declaration that the defendant was guilty of the ſuppoſed offence whereof he was ſo convicted as in the declaration is mentioned.

This caſe was argued in *Eaſter* Term laſt by *Hullock* for the defendant in ſupport of the demurrer, and by *Wood* for the plaintiffs, and again on this day by *Holroyd* for the former; *Law* was alſo to have argued for the plaintiffs.

On behalf of the defendant four objections were taken; 1ſt, That *no action* could be maintained to recover ſuch a penalty, or at leaſt no action could be brought unleſs there be a previous judgment for the penalty on the conviction for perjury; 2dly, That if any action could be brought, *this action* could not be ſupported *by the aſſignees of the bankrupt*; 3dly, That it was not ſtated that the defendant had committed perjury; and 4thly, That the judgment of conviction on which the action was founded was erroneous on the face of it, and could not therefore be the foundation of any action. Firſt; The penalty, to recover which this action is brought, was for the firſt time impoſed by the ſtatute 5 *Geo.* 2. *c.* 30. *ſ.* 29. (*a*); and it is a general rule, that where a penalty is given in a new caſe by act of parliament, and a particular mode of recovering it is pointed out by the ſtatute, payment of the penalty cannot be enforced in any other way. 7 *Co.* 36. *a.* Now here the mode pointed out by the ſtatute is by judgment on the conviction for perjury. The ſtatute does not ſay that this penalty ſhall be recovered in the ſame manner as other penalties may, but "may be recovered and levied *as other penalties and forfeitures are upon penal ſtatutes after conviction to be levied and recovered*," that is, either by a levari facias on the judgment, or by a commitment under the judgment until the penalty be paid. By ſtat. 23 *Eliz.* *c.* 1. *ſ.* 4. Every perſon ſaying maſs and being thereof convicted ſhall forfeit 200 marks, and be committed to priſon in the next gaol,

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(*a*) That ſtatute enacts that "If any perſon ſhall before the acting commiſſioners in any commiſſion of bankrupt &c. ſwear that any ſum of money is due to him or her from any bankrupt, which ſum of money is not really due or owing, or ſhall ſwear that more is due than is really due or owing, knowing the ſame to be not due or owing, or that ſuch oath is falſe and untrue, and being thereof convicted by indictment or information, ſuch perſon ſhall ſuffer the pains and penalties inflicted by the ſeveral ſtatutes made and now in force againſt wilful perjury, *and ſhall moreover be liable to pay double the ſum ſo ſworn to be due or owing as aforeſaid, to be recovered and levied as other penalties and forfeitures are upon penal ſtatutes after conviction to be levied and recovered*; and ſuch double ſum ſhall be equally divided among all the creditors ſeeking relief under the ſaid commiſſion."

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gaol, there to remain by the ſpace of one year and from thenceforth until he has paid the ſum of 200 marks; and in *Co. Entr.* 362. there is an entry of a judgment on that ſtatute adjudging the forfeiture of the money. Again by the 5th ſection of the ſame ſtatute every perſon who does not attend church is liable (inter alia) to a penalty of 20*l.* "being thereof lawfully convicted." On this act too the penalty has always been recovered by a judgment for it on the information or indictment. *R.* v. *Law*, 3 *Bulſtr.* 87; Dr. *Foſter's* caſe, 11 *Co.* 59.; *R.* v. *Vachell*, 1 *Anderſ.* 138; *R.* v. Sir *J. Webb*, *Bridgm.* 120. So on the ſtat. 3 & 4 *W.* & *M. c.* 10. on a conviction for deer ſteeling, a levari facias iſſues on the conviction to levy the penalty. *R.* v. *Speed*, *Salk.* 379; and in *R.* v. *Hawkes*, 2 *Str.* 858., *Fitzg.* 124. a conviction on that ſtatute was quaſhed for want of a judgment for the penalty. That the Legiſlature intended that this penalty ſhould only be recovered on a conviction on an indictment or information is alſo apparent from this circumſtance, that when they intended that the penalty ſhould be recovered *by action*, they ſaid ſo in expreſs terms; as in ſtat. 9 *An. c.* 14. *ſ.* 5. where any perſon by fraud or deceit wins 10*l.* of another by cards, &c. he is upon an indictment or information to forfeit five times the amount of the ſum won, he becomes infamous, and is to ſuffer ſuch corporal puniſhment as in caſes of wilful perjury, "and ſuch penalty to be recovered *by ſuch perſon as ſhall ſue* for the ſame *by ſuch action* as aforeſaid." So in the ſtat. 25 *Car.* 2. *c.* 2. *ſ.* 5. it is enacted that if any perſon ſhall neglect or refuſe to take the oaths preſcribed, and ſhall nevertheleſs execute any office, "being thereof lawfully convicted," he ſhall be diſabled to ſue in any action, to hold any office &c, and ſhall forfeit 500*l.* "to be recovered by him that ſhall ſue for the ſame *by any action* &c." Theſe ſtatutes alſo afford another obſervation in ſupport of this objection, that they point out the perſons who are to ſue for the penalties by action, whereas the ſection of the act on which this action is founded does not mention any plaintiff; and yet other clauſes in this very act expreſsly mention the perſons who are to ſue in caſes where it is clear that the Legiſlature intended to give an action; Sect. 5, 19, 21, 23, 30. At all events if this penalty can be recovered by action in ſuch a caſe as the preſent, there ſhould be a previous adjudication of the penalty on the indictment. Until the judgment for the penalty the defendant is not liable to be ſued, nor is any perſon entitled to ſue him for ſuch

ſuch penalty. The caſe of *R.* v. *Luckup* is not an authority againſt this poſition; for in 1 *Bl. Rep.* 382 (*a*). it appears that the caſe is miſreported in 2 *Str.* 1048, it being a proceeding on the ſecond, and not on the fifth, ſection of the ſtat. 9 *Ann. c.* 14. Secondly, This action in the names of the aſſignees cannot be ſupported; it ſhould have been brought by all the creditors ſeeking relief under the commiſſion. At common law the aſſignees have no right of action; their rights are given to them by ſtatutes. The ſtatutes, which veſt the property of the bankrupt in the aſſignees, only authoriſe them to ſue for debts due to, or on contracts made by, the bankrupt. But this action is not founded on a contract, nor was the ſum to be recovered a debt due to the bankrupt. There is no inſtance of an action by the aſſignees of a bankrupt (unleſs ſpecially and expreſsly given by ſome act of parliament) but on a cauſe of action exiſting in the bankrupt at the time of the bankruptcy, or that would have exiſted in him if the bankruptcy had not intervened. The caſe of *Brandon* v. *Pate* (*b*), where it was holden that the aſſignees of a bankrupt might recover from the winner money loſt at play by the bankrupt before his bankruptcy on the ſtat. 9 *An. c.* 14. *ſ.* 2. cannot be conſidered as an exception to this rule; becauſe the foundation of that judgment was that the money recovered by the aſſignees had been part of the bankrupt's property previous to his bankruptcy and had been paid over to the defendant without any conſideration. Therefore though the aſſignees, being creditors, are *ſome* of the perſons grieved, they alone are not entitled to ſue in this caſe, inaſmuch as the reſt of the creditors ought alſo to have joined. Nor does the inconvenience of ſo many perſons ſuing give any anſwer to this objection, becauſe that can only be

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(*a*) *Quære* The account in 1 *Bl. Rep.* 382. where Mr. J. *Denniſon* is ſuppoſed to have ſaid, "I was counſel for *Luckup* (alluding to the caſe of *R.* v. *Luckup* which had been cited from 2 *Str.* 1048.) *The proſecutor*, finding it difficult to prove a *fraud*, *had recourſe to the other clauſe* for winning above 10 *l.*" For whatever action may have been brought againſt the defendant *Luckup* on the ſecond clauſe for winning above 10 *l.*, it not only appears from 2 *Stra.* 1048. *Tr.* 10 (*not* 9) *Geo.* 2. that the defendant *Luckup* had been convicted on an information on the fifth ſection of the ſtatute for *fraudulently* winning &c, where the motion was that a fine ſhould be impoſed on the defendant, but it alſo appears from a MS. of Mr. Juſtice *W. Forteſcue*, who was then at the bar and counſel for the proſecution, that in the *Michaelmas* Term preceding (*M.* 9 *Geo.* 2.) there was a motion for a new trial in the caſe of "*Rex* v. *Luckup*," on an information on the ſtatute for fraudulently winning &c, on the ground that *Perkins*, who had loſt the money and on whoſe evidence the defendant had been convicted, was not a competent witneſs, which rule was after argument diſcharged, the Court being unanimouſly of opinion that *Perkins* was a competent witneſs.

(*b*) 2 *H. Bl. Rep.* 308.

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remedied by the Legiſlature. Thirdly, The third objection is alſo fatal, whether it be conſidered with reference to the words of the ſtatute or to the general principles of pleading. The ſtatute ſays that if any perſon ſhall ſwear &c, *and* be thereof convicted &c, he ſhall forfeit &c. Two things are there pointed out as the grounds of the action, the taking of the falſe oath and the conviction for it: whereas this declaration only ſtates the latter, leaving the former to be preſumed. But it is a principle in pleading that when the plaintiff ſues for a penalty, he muſt ſet forth in his declaration all thoſe requiſites that give him a right of action. Stating the conviction alone is not ſufficient; if it were proof of the conviction it would alone be ſufficient to entitle the plaintiff to recover: but the proceedings by indictment and by action on this ſtatute (if any action can be maintained) are not only diverſo intuitu, but the conviction on the indictment cannot be evidence of the guilt in an action for the penalty, as being res inter alios acta, though it may be evidence of the fact of the conviction. In *R.* v. *Sutton*, 1 *Saund.* 269, an information was filed by the King's coroner againſt the defendant for a debt due to one *E. Lapworth* lately deceaſed, ſtating an inquiſition finding that *E. Lapworth* had committed ſuicide by which her goods &c were forfeited to the king: but *Saunders* (p. 275.) ſuggeſts an opinion that the information was not good, becauſe it did not firſt ſtate the fact that *E. Lapworth* had committed ſuicide and then the inquiſition upon it. And accordingly in *Toomes* v. *Etherington*, 1 *Saund.* 361. in a plea to a ſcire facias on a judgment, the fact of ſuicide was ſtated as a ſubſtantive allegation, and then it was alleged that it was found by an inquiſition that the party had committed ſuicide. Fourthly, The act ſays that the party convicted ſhall ſuffer the pains and penalties inflicted by the ſeveral ſtatutes made and now in force againſt wilful and corrupt perjury. The only ſtatutes then in force againſt perjury were, 5 *Eliz. c.* 9. *ſ.* 6 & 7, and 2 *Geo.* 2. *c.* 25. *ſ.* 2. By the former the perſon convicted is to forfeit 20*l.*, to be impriſoned ſix months, his oath is not to be received in any court of record until the judgment be reverſed, and if he has no goods to the value of 20*l.* then he is to be ſet on the pillory. By the latter he is, beſides the puniſhment before preſcribed, to be ſent to ſome houſe of correction for a time not exceeding ſeven years, there to be kept to hard labour, or to be tranſported for ſeven years. Now this judgment is not warranted by either of theſe ſtatutes. It is an

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abſolute judgment to be ſet on the pillory, whereas it ſhould have been only *conditional*, namely, in the event of the defendant not having goods &c. to pay the penalty of 20*l*. In *Co. Entr.* 368. *b.* there is an entry of a judgment, which purſues the directions of the ſtat. 5 *El. c.* 9. By this judgment alſo the defendant was ordered to be impriſoned in the *gaol* at *York*, inſtead of ſome *houſe of correction*, according to the ſtat. 2 *Geo.* 2. This judgment is alſo errroneous in another reſpect, in not adjudging, according to ſtat. 5 *Eliz. c.* 9., that the defendant ſhould be diſcredited until the judgment is reverſed, which part of the judgment cannot be pardoned by the king. *R.* v. *Griepe*, 1 Lord *Raym.* 257, 8. This is not like a conviction at common law, where the diſcrediting is only a conſequence of the judgment; this is a part of the judgment itſelf under the ſtatute. Now if the judgment be erroneous on the face of it, it cannot be the foundation of an action.

The plaintiffs counſel, in anſwer to the two firſt objections, relied on the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 11, 12., intitled "An act for the better relief of the creditors againſt ſuch as ſhall become bankrupts;" obſerving that it being a ſtatute in pari materiâ muſt be conſidered as incorporated into the ſtat. 5 *Geo.* 2. *c.* 30. The eleventh ſection enacts that if any perſon, other than the bankrupt, ſhall wilfully and corruptly commit any manner of wilful perjury by his depoſition to be taken before the commiſſioners, he may be indicted in any of the king's courts of record, and after his conviction thereof he ſhall incur ſuch forfeiture and receive and ſuffer ſuch pains and puniſhment as are limited by the ſtatute made concerning perjury, 5 *Eliz.* And it is enacted by the twelfth clauſe "that all and every ſum and ſums of money which ſhall be forfeited by force of this preſent act ſhall be ſued for and recovered by the ſaid creditors only, *or any of them that will ſue for the ſame*, by action of debt, &c. in any of the king's courts of record; and the ſum or ſums of money ſo recovered, the charges of ſuit being deducted, ſhall be diſtributed and divided towards the payment of the ſaid creditors of the bankrupt." Anſwer to the third objection. It is admitted that the conviction is concluſive with reſpect to the corporal puniſhment, but it is argued that it has not that effect with regard to the penalty: but the conſequence of that argument would be that after the defendant has ſuffered an ignominious puniſhment his guilt may again be queſtioned in another iſſue, when it may become a queſtion whether

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whether or not he ſhould have been puniſhed at all. Reaſon therefore as well as the principles of law require that the conviction on the indictment ſhould be concluſive evidence of the guilt in this action; if ſo, it was ſufficient merely to ſtate the conviction, without alſo ſettiug forth the previous ſteps that led to it. If the fact of taking the falſe oath had been alleged, that might have been traverſed: but that would have been permitting the defendant to traverſe a matter of record which is never allowed. *Fanſhaw* v. *Morriſon*, *Salk.* 521. No traverſe can be taken but where the thing traverſed is iſſuable, *Cro. Jac.* 221. In *Bro.* "Travers d'Office," *pl.* 35. this diſtinction is taken; if a man after committing felony convey lands to *A.* and be then *convicted* by a verdict of twelve, *A.* cannot traverſe the guilt of the felon, though he may, if the felon only *confeſs* his guilt. The preſent caſe is diſtinguiſhable from that cited from 1 *Saund.* 269, which was on an inquiſition of office; for an inquiſition is traverſable, but a conviction is not. Beſides what is there ſaid is only the opinion of *Saunders* himſelf, and it is contrary to univerſal practice in ſuch and analogous caſes. In an indictment againſt an acceſſary for murder or felony, it is uſual to ſtate the record of conviction of the principal and then the charge againſt the priſoner as acceſſary. Fourthly; If there be error in the judgment, it muſt be reverſed by writ of error; till when it is available to all purpoſes.

Lord Kenyon Ch. J. I have looked into the ſeveral caſes cited ſince the firſt argument, and am of opinion that there is no weight in either of the objections. The plaintiffs have put the caſe in ſuch a ſhape as to give the defendant an opportunity of taking the opinion of a ſecond jury on his conduct, and the firſt objection taken by his counſel is that his client ought to be bound by an indictment againſt him on a criminal charge. By adverting to the ſtat. 1 *Jac.* 1. *c.* 15. it is manifeſt that the penalty is not to be recovered by a judgment on the indictment, but by action. But even without the aſſiſtance of that act of parliament, when the ſtat. 5 *Geo.* 2. *c.* 30. ſaid that this penalty ſhould be recovered and levied as other penalties and forfeitures are upon penal ſtatutes after conviction to be levied and recovered, I ſhould have thought that the defendant was not deprived of his trial by jury *in an action*. When an act of parliament gives a different mode of trial, we look with eagle's eyes to diſcover if that privilege be taken away. Nor is it neceſſary to diſcuſs the ſecond objection, ſince the ſame ſtat. 1 *Jac.* 1. removes all difficulty upon that head. But

But even here again, without the aid of that ſtatute, when this act directed that the penalty when recovered ſhould be equally divided among all the creditors, I ſhould have had no doubt but that this might be recovered by the aſſignees who ſue for the benefit of themſelves and the other creditors. The third and fourth objections are equally deſtitute of foundation. If the judgment be improper, it can only be reverſed by writ of error.

Ashhurst and Grose Juſtices, of the ſame opinion.

Lawrence J. With regard to the third objection, I had ſome doubt when the caſe was firſt argued, whether or not the fact of taking the falſe oath ſhould not have been ſtated: but on further conſideration I think that was not neceſſary. This is warranted by the proceedings againſt an acceſſary: for though in ſuch caſes it is ſometimes ſtated in the indictment that the principal committed the fact, yet the more uſual way is only to ſtate the conviction againſt the principal and then to charge the defendant as an acceſſary with him. I have been ſearching for precedents on the ſtat. 9 *An. c.* 14. *ſ.* 5., the words of which are very much like thoſe in the ſtat. 5 *Geo.* 2.; and though I have not met with any in print, I have been favoured by my brother *Buller* with a manuſcript precedent of the declaration in *Morgan* v. *Luckup* on that act, where it is only ſtated that the defendant had been convicted on an information for the fraudulent gaming, without any allegation that he had committed the fact. That caſe therefore, as far as it goes, is an authority for the preſent action. As to the laſt objection; the judgment on the indictment muſt be taken to be good until it is reverſed by a writ of error; as in the caſe of proceedings againſt the acceſſary (*a*). So if there be a judgment againſt the huſband for treaſon not reverſed by error, it is ſufficient to deprive the wife of her dower.

Per Curiam, Judgment for the plaintiffs.

(*a*) *Vid.* 1 *Hale P. C.* 625.

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Saturday, Jan. 27th.

The KING *againſt* The Inhabitants of St. GEORGE THE MARTYR, SOUTHWARK.

A. took a tenement of 10*l. per ann.* in the pariſh of *B*., and after living in it with his family five days he was arreſted and ſent to priſon in the pariſh of *C*., but his wife and children continued in it ſeven weeks longer: held that no ſettlement was gained in *B*. either by the huſband or wife.

THE Court of Quarter Seſſions in *Surry* quaſhed an order of two juſtices, for the removal of *Mary Lord* the wife of *J. Lord* and her two children from *St. George the Martyr* in *Southwark* to *St. Martin in the Fields Weſtminſter*, and ſtated the following caſe for the opinion of this Court.

J. Lord the huſband not being ſettled in either of the contending pariſhes took the firſt floor of a houſe No. 21 *Chandos-Street* in *St. Martin*'s pariſh of a Mr. *Railton* who then kept the houſe at 15*l. per annum*, unfurniſhed, the rent to be paid quarterly. He went into poſſeſſion on the 17th of *March*, and on the 22d of the ſame month he was arreſted and carried to the *Marſhalſea* priſon in *St. George*'s pariſh, but his family continued to reſide at No. 21. in *Chandos-Street* until the 6th of *May* following, being the ſpace of ſeven weeks, the huſband remaining from the time of his arreſt and ſtill being in the *Marſhalſea* priſon. After he was arreſted the landlord applied to his wife for the payment of the rent weekly, aſking 5*s.* 9*d. per* week; but his wife refuſed to pay, alleging that the rent was to be paid quarterly. When the wife and children could ſtay there no longer but went to the huſband in priſon, the latter agreed to give up the poſſeſſion, and the landlord by conſent took ſome part of his furniture for the ſeven weeks' rent. The queſtion reſerved for the opinion of the Court was, Whether the huſband *J. Lord* gained a ſettlement in the pariſh of *St. Martin* under the above circumſtances?

Mingay and *Marryat*, in ſupport of the order of Seſſions. The huſband *J. Lord* did not gain any ſettlement in the pariſh of *St. Martin*'s, becauſe he only reſided there ſeven days, and a reſidence for forty days is neceſſary for the purpoſe of acquiring a ſettlement. In *R*. v. *Llanbedergoch* (*a*) it was holden that the pauper, who after reſiding for twenty-nine days on a tenement of 10*l. per annum* was *forcibly* prevented reſiding there eleven days more, did not gain a ſettlement. Neither did the wife and children of *J. Lord* acquire a ſettlement in *St. Martin*'s by their reſidence in that pariſh, becauſe a wife cannot in the abſence and during the lifetime of the huſband who has a ſettlement of his

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(*a*) *Ante* 105.

own gain a ſettlement herſelf. *R.* v. *Aythorp Rooding*, *Burr. S. C.* 412. This caſe is diſtinguiſhable from the two caſes that were relied on at the Seſſions, St. *Margaret Weſtminſter* v. St. *Martin's Ludgate*, 2 *Conſt's Bott.* 146., and *R.* v. *Leeds*, *ib.* 208., and *Burr. S. C.* 524. In the former the pauper not only rented a houſe for 25 *l.* a year within the rules of the *Fleet* priſon, but alſo paid taxes for the ſame for eight years, which alone would give a ſettlement. And in the other caſe the pauper, renting two diſtinct tenements, one at *Blackfordly*, the other at *Leeds*, after reſiding three months at the former, reſided more than 40 days at the latter, and then returned to the former, where he reſided 27 days more: but that was a ſhifting ſettlement, and as he reſided more than 40 days at each of thoſe places, it was ruled that he was ſettled at *Blackfordly* where he ſlept the laſt night.

Erſkine and *Lawes* were proceeding to argue that *J. Lord* had gained a ſettlement in St. *Martin*'s, but were relieved by

Lord Kenyon Ch. J. who ſaid that it was impoſſible to ſupport that propoſition without obliterating the material words from the ſtatute of *Charles* the Second, and overruling all the deciſions on the ſubject; for that they all proved that no ſettlement could be gained by a reſidence on a tenement for a ſhorter period than 40 days. And though in the caſe of *R.* v. *Leeds* it was only decided that the juſtices ought not to have removed the pauper from *Blackfordly* during the continuance of his leaſe, the Court added that "if his leaſe at *Blackfordly* had been at an end, his laſt 40 days reſidence at *Leeds* might have borne a different conſideration;" evidently intimating an opinion that 40 days reſidence is neceſſary to give a ſettlement.

Per Curiam, Order of Seſſions confirmed.

The King *againſt* The Juſtices of the West Riding of Yorkshire.

Saturday, Jan. 27th.

The Court will not quaſh a return to a mandamus (which directed an inferior Court to give judgment on an indictment) merely becauſe it ſtates an erroneous judgment given below: but a writ of error muſt be brought to reverſe that judgment.—On an indictment for a nuiſance in *erecting* a wall acroſs a road (not for *continuing* the nuiſance) it is not neceſſary to adjudge that the nuiſance be abated; *Semb.*

To a writ of mandamus, which (after reciting that an indictment had been preferred and found at the Quarter Seſſions of the *Weſt Riding* of *Yorkſhire*, holden &c, againſt *William Stead* and *J. Stead*, for certain treſpaſſes and nuiſances, in unlawfully and injuriouſly *erecting*, *building*, *and ſetting up* a certain wall &c,

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upon and acroſs a certain common and ancient pack and prime way leading &c, to which *W.* and *J. Stead* had pleaded not guilty, and on which indictment they had been duly convicted &c,) commanded the defendants to give judgment on the ſaid indictment againſt the ſaid *W.* and *J. Stead*, the defendants made a return, ſtating that at the Quarter Seſſions holden, &c, "they gave judgment againſt the ſaid *W.* and *J. Stead*, on the ſaid indictment for the offence aforeſaid, which ſaid judgment was that the ſaid *W.* and *J. Stead* ſhould be fined the ſum of 6*d.* each and be diſcharged."

This return was ſet down in the paper for argument; and now

France objected to it, becauſe it did not ſtate that the defendants had given a full judgment on the indictment againſt *W.* and *J. Stead.* This being an indictment for a nuiſance, it ſhould have been part of the judgment that the nuiſance be abated. *R.* v. *Pappineau*, 2 *Str.* 686. Nor is it any anſwer to this objection to ſay that the judgment given in this caſe may be reverſed by writ of error, for in order to bring a writ of error the Court to which the writ is directed ſhould have given a complete judgment on the whole matter; *Metcalfe*'s caſe, 11 *Co.* 39: whereas this is but an imperfect judgment. But

The Court ſaid, that it did not appear to them that the juſtices at the Quarter Seſſions ought to have adjudged that the nuiſance ſhould be abated, the indictment not charging the defendants with *continuing*, but merely with *erecting*, the wall, ſo that for any thing that appeared on the record the nuiſance did not in fact exiſt at the time when the indictment was preferred. But that it was not neceſſary to determine this point in the preſent caſe, becauſe even if the judgment given below were erroneous, this was not the proper mode of correcting the error, but that the proſecutor muſt bring a writ of error, as was done in the caſe cited from *Strange*.

The return was allowed.

Doe on the Demiſe of Bass *againſt* Roe.

Monday, Jan. 29th.

In certain caſes the Court will permit an amendment to be made in a notice at the bottom of a declaration in ejectment.

A Declaration in ejectment for lands in *Devonſhire* having been delivered with notice to the tenants to appear in *Michaelmas* term laſt, which was wrong, as the notice in a country ejectment muſt according to the practice be to appear in an iſſuable term,

Cowper obtained a rule in the laſt term, on behalf of the leſſor of the plaintiff, calling on the defendants to ſhew cauſe why the notice ſhould not be amended, by inſerting *Hilary* inſtead of *Michaelmas* term, on payment of coſts, on an affidavit ſtating that the leſſor of the plaintiff could not now bring another ejectment on account of the Statute of Limitations, the twenty years having expired after this declaration was delivered and before the miſtake was diſcovered, and ſtating alſo that the leſſor of the plaintiff had been hitherto prevented by poverty trying his cauſe before.

Gibbs, who now ſhewed cauſe, mentioned the caſe of *Roe* d. *Stephenſon* v. *Doe*, *Barnes* 186. to ſhew that formerly no amendments were permitted to be made even in declarations in ejectment; and he ſaid that there was no inſtance in which the Court had ever permitted an amendment to be made in the notice at the end of the declaration; and that the reaſon ſuggeſted for allowing this amendment was rather a reaſon why the Court ſhould refuſe it, ſince the application was in effect to extend the time in the Statute of Limitations (*a*).

Per Curiam. The caſe cited from *Barnes* has been long ſince overruled. The Courts have been of late years much more liberal than they were formerly in every part of the practice reſpecting ejectments. By refuſing this rule we may probably do great injuſtice, whereas by granting it we ſhall merely give the leſſor of the plaintiff an opportunity of trying his title.

Rule abſolute.

(*a*) Vid. *Maddock q. t.* v. *Hammett*, *ante* 55. and the caſes there cited.

Monday, Jan. 29th.

Maule and another *againſt* Murray and another.

Defendant, who had been arreſted in *America*, again arreſted here for the ſame cauſe of action.

The defendants were indorſers of certain bills of exchange drawn by *Robert Murray* and Co. in *America* on *Bird* and Co. in *England*, which bills were returned to *America*, proteſted for non-acceptance. On their return the defendants, who are merchants in *New York*, tendered payment of the ſums contained in the bills with intereſt, which the plaintiffs refuſed to accept unleſs 20 *l. per cent.* were alſo paid as charges upon the return of the bills; this being refuſed by the defendants the plaintiffs held them to bail in *America* for 15,750 *l.* by proceſs out of the Court in *New York*, and the plaintiffs proceeded ſo far in that ſuit as to obtain judgment for the amount of the bills and intereſt, but a ſpecial caſe was reſerved as to the claim of the 20 *l. per cent.* The defendant *Murray* lately came to this country on the neceſſary buſineſs of the partnerſhip; and having been arreſted here by the plaintiffs for the ſame demand, he obtained a rule on a former day calling on the plaintiffs to ſhew cauſe why he ſhould not be diſcharged on filing common bail, on an affidavit ſtating the above facts, and alſo ſtating that he and his partner were ſolvent, and had made arrangements in *America* for the payment of this demand.

Law and *Lawes*, in ſupport of the rule, likened this to the ordinary caſe of a ſecond arreſt in this country for the ſame ſum, in which caſe the defendant is entitled to be diſcharged.

Mingay and *Marryat*, on the other hand, ſaid there was no ſimilarity between the two caſes, for that this Court would not take judicial notice of an arreſt in a foreign country; adding that it would be unjuſt to deprive the plaintiffs of perhaps the only ſecurity they had for the payment of their debt. And

The Court were of this opinion, and

Diſcharged the rule.

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Wedneſday, Jan. 31ſt.

The KING *againſt* The Inhabitants of ALFRETON.

The ſon of a certificated perſon cannot gain a ſettlement in the certificated pariſh by apprenticeſhip, though the father (to whom the certificate was given) died ſix months before the expiration of the apprenticeſhip.

AN order of two juſtices, for the removal of *Mary Henſon*, wife of *Charles Henſon*, and *William* her child, from *Hucknell Torkard* to *Alfreton*, was confirmed on appeal to the *Nottinghamſhire* ſeſſions, where the following caſe was reſerved for the opinion of this Court. The pauper *Charles Henſon* was born in the pariſh of St. *Mary Nottingham*, when his father was reſiding there under a certificate from *Alfreton*. Whilſt his father was ſo reſiding in *St. Mary*'s, the pauper was bound apprentice to *R. Claypole* of the ſame pariſh for ſeven years by indenture; and after ſerving him two years, he was aſſigned to *H. Pacey* of the ſaid pariſh. Six months before the expiration of the apprenticeſhip, the pauper's father and mother both died, and the pauper continued to ſerve his maſter *Pacey* the remainder of the term in the ſame pariſh.

Vaughan was to have argued in ſupport of the order of ſeſſions, but the Court deſired

Clarke on the other ſide to begin. Although it was holden in *R.* v. *Sherborne* (*a*) that a pariſh certificate extends not only to the perſon to whom it is granted, but alſo "to all his family and all his children," that doctrine was afterwards overruled in *R.* v. *Heath* (*b*), where it was ruled that when the ſon of a certificated perſon married and lived in a houſe of his own, he ceaſed to be under the protection of the certificate, and might gain a ſettlement in the certificated pariſh by being rated and paying rates there. And in *R.* v. *Darlington* (*c*), *Buller* J. ſaid, "The man to whom the certificate was granted was the perſon whom the Legiſlature had in view." Then here the inſtant the pauper was bound apprentice, he ceaſed to be part of his father's family: his reſidence in the pariſh of *St. Mary* was protected not by his father's certificate, but by the indentures of apprenticeſhip, for he was then irremoveable. But whatever might be the ſituation of the pauper during his father's life, the inſtant the father died the certificate was at an end: he was no longer part of his father's family, and conſequently not included in the certificate, according to the caſe of *R.* v. *Darlington*. Now it is ſtated in the caſe that the pauper ſerved more than 40 days in *St. Mary*'s after his father's

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(*a*) *Burr.* S. C. 182.

(*b*) *Ante*, 5 vol. 583.

(*c*) *Ante*, 4 vol. 891.

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father's death, and by that reſidence he gained a ſettlement there. Suppoſing the father had removed into another pariſh after the apprenticeſhip of the ſon, the certificate would have been functus officio, and then the ſon would have gained a ſettlement in this pariſh, by ſerving 40 days there as an apprentice. And whether the certificate be at an end by the death or the removal of the father, the conſequence is in either caſe the ſame with regard to the other branches of his family. This caſe is diſtinguiſhable from that of *R.* v. *Hampton* (*a*), for that depended on the ſtat. 12 *An. ſt.* 1. *c.* 18. *ſ.* 2., whereas this turns on the conſtruction of the ſtat. 9 & 10 *W.* 3. *c.* 11.

Lord Kenyon Ch. J. This is an attempt on the part of the pariſh of *Alfreton* to put a conſtruction on the certificate act different from that which it has invariably received ever ſince it was paſſed. The rule was laid down in the caſe of *R.* v. *Darlington* in terms ſo plain that he who runs may read. And the *Sherborne* caſe, in which it was holden that a certificate extends not only to the perſon himſelf to whom it is granted but alſo to his family, was not overruled, although it was explained, by that of *R.* v. *Darlington.* All the caſes have ſaid that *children* are part of the family of the certificated perſon, and within the protection of the certificate act: in *R.* v. *Darlington*, the queſtion was, Whether or not the certificate extended to *grandchildren*; the Court ſaid it did not, but was confined to the perſon himſelf, and to his children, and that a ſecond generation was not within the meaning and protection of the act. And in the caſe of *R.* v. *Heath* I wiſhed to adopt the doctrine eſtabliſhed in the caſe of *R.* v. *Darlington.* But this is an attempt to overturn all the caſes upon the ſubject.

Ashhurst J. The deciſions upon this point are clear and deciſive; and it would be of dangerous conſequence now to overſet them.

Grose J. In the caſe of *R.* v. *Heath* we determined that a ſon ceaſed to be part of his father's family when he married and became the head of a family himſelf: but this caſe is very diſtinguiſhable from that, for here the reſidence of the ſon in *St. Mary*'s was protected by the certificate granted to the father; and to determine that the ſon could gain a ſettlement in that pariſh by apprenticeſhip would be to ſay that all the former caſes on this ſubject were improperly decided.

(*a*) *Ante*, 5 vol. 266.

LAWRENCE J. In contemplation of law this ſon came into the pariſh of *St. Mary* under the certificate: now the ſtatute ſays, that a perſon who comes into a pariſh by a certificate can only gain a ſettlement there in one of two ways; but apprenticeſhip is not either of thoſe two ways, and therefore the pauper did not gain a ſettlement there.

Both orders were confirmed.

DUPEROY *againſt* JOHNSON.

Thurſday, Feb. 1ſt.

Demurrer to one count, (on a bill of exchange,) and judgment for the plaintiff; plea to the other counts, on which iſſue was joined.—Referred to the Maſter to ſee what was due to the plaintiff on the former.

THIS was an action on promiſes. The declaration contained ſeveral counts, one of which was on a bill of exchange; to that one there was a demurrer, on which the plaintiff had judgment; to the others there was a plea on which iſſue was joined. A rule having been obtained calling on the defendant to ſhew cauſe why it ſhould not be referred to the Maſter to compute what was due to the plaintiff for principal intereſt and coſts on the count on the bill of exchange,

Gibbs now ſhewed cauſe againſt it; ſaying that, as there were ſeveral other counts to which the defendant had pleaded, and on which plea the parties were at iſſue, this motion was premature; for that the plaintiff ought to wait to ſee the reſult of the trial of that iſſue, or if he did not intend trying that iſſue that he ſhould have entered a noli proſequi as to thoſe counts.

Bedford, in ſupport of the rule, relied on the caſe of *Fleming* v. *Langton*, 1 *Str*. 532, where under circumſtances like the preſent the Court refuſed to ſet aſide a writ of enquiry which had been executed on the judgment on the demurrer, though the plaintiff had not entered a noli proſequi as to the other counts.

The Court thought that caſe deciſive of the preſent, and made the

Rule abſolute.

Saturday, Feb. 3d.

Dickinson *againſt* Plaisted.

The Court will give leave to amend a record by inſerting a ſpecial memorandum of the day when the plaintiff's bill was filed, after a writ of error brought.

This was an action on a promiſory note that became due on the 5th of *September* 1796. The plaintiff filed his bill againſt the defendant, who is an attorney, in *Trinity* vacation (2d of *Nov.* 1796,) but with a general memorandum of the preceding *Trinity* term. The defendant pleaded a judgment recovered, and afterwards demurred to a replication of nul tiel record. On this demurrer judgment was given for the plaintiff in *Michaelmas* term 1796; when the roll, not being written out at length, was brought into Court, containing only the general memorandum and the names of the parties, on which the officer of the Court marked the word "read." It appeared to be the practice of the Court for the plaintiff's attorney on obtaining judgment to take away ſuch roll and complete it afterwards at his leiſure. In *Hilary* term 1797 the defendant brought a writ of error, and aſſigned for error that the bill was filed before the cauſe of action accrued; after which the plaintiff's attorney, under the advice of a very reſpectable gentleman at the bar, who thought it warranted by ſeveral inſtances of the ſame kind, altered the roll by inſerting a ſpecial memorandum of the day when the bill was actually filed inſtead of the memorandum of *Trinity* term generally. Upon this the defendant obtained a rule, calling on the plaintiff to ſhew cauſe why the roll ſhould not be amended and made conformable to the iſſue joined, and why the tranſcript ſhould not be made agreeable to ſuch altered roll, and why the plaintiff ſhould not pay the coſts of this rule.

The plaintiff's counſel, in ſhewing cauſe againſt this rule, attempted to give two anſwers to it; 1ſt, That there was nothing to amend by; and 2dly, That the defendant had conſented (*a*) to the plaintiff's making the alteration he had made on an application to him by the plaintiff as ſoon as he diſcovered the error.

But *The Court* were clearly of opinion that this rule ought to be made abſolute. For that, though the Court would, on an application made by the plaintiff, have permitted him to make the alteration propoſed, it was highly improper for the plaintiff himſelf to alter the roll without their conſent. That the roll in this

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(*a*) No conſent appeared to have been expreſsly given, but it was inferred from a converſation between the plaintiff and the defendant's attorney which was ſtated in an affidavit.

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caſe, though not complete at the time when judgment was given on the demurrer, was conſidered as part of the judicial proceedings of the Court; and that it was only for the convenience of the ſuitors that ſuch an imperfect roll was allowed to be brought in, for that when the Court pronounced judgment it was on a ſuppoſition that the whole record was then in Court. That even if the defendant had expreſsly conſented to the alteration in this caſe, the Court, when the matter was diſcloſed, were bound to interfere in order to prevent any alteration being made in the records of the Court without their permiſſion. Accordingly

That rule was made abſolute.

On a ſubſequent day in the term the plaintiff obtained another rule, calling on the defendant to ſhew cauſe why he (the plaintiff) ſhould not be at liberty to amend the bill filed by inſerting a ſpecial memorandum of the day of filing the ſame, and why he ſhould not be at liberty to carry in a new roll agreeable to ſuch amended bill and to make the tranſcript conformable to ſuch new roll; which rule was made abſolute, notwithſtanding an objection by the defendant's counſel that the application came too late, becauſe it was not made until after a writ of error was brought. And on this occaſion

The Court ſaid that the rule itſelf appeared to be reaſonable. That, though the plaintiff had acted inadvertently at firſt in making the alteration without leave of the Court, nothing improper was intended, it having been done under the advice of counſel; but they ſaid they ſhould ſtrongly animadvert on a ſimilar proceeding in future. And that the lateneſs of this application was no objection, ſince nothing was more common than an application to the Court of Chancery to grant an original after the want of an original had been aſſigned for error.

Rule abſolute on payment of coſts and alſo the coſts in error.

Fallowes *againſt* Taylor.

Monday, Feb. 5th.

A bond given to an individual, conditioned to be void if the obligor (on the obligee's agreeing not to proſecute him) ſhould remove certain public nuiſances, and not erect any others of the ſame kind, is good in law.

The defendant in *March* 1796 executed a bond to the plaintiff in the penalty of 500*l.*, with a condition (after reciting that the defendant had erected and for two or three years kept and continued three walls or cribs acroſs the river *Wye*

which

FALLOWES *againſt* TAYLOR.

which were a nuiſance to the navigation, that the magiſtrates aſſembled at the Quarter Seſſions at *Hereford* had directed the plaintiff (*a*) to proſecute all perſons erecting keeping or maintaining ſuch walls cribs and other nuiſances in and upon the river in order to preſerve the navigation, and that in purſuance of ſuch orders he (the plaintiff) had prepared bills of indictment againſt the defendant, who in order to avoid the expence of the indictment had applied to the plaintiff not to prefer the ſame, upon condition that he (the defendant) ſhould remove the ſaid nuiſances and enter into this bond, to which the plaintiff had conſented) that if the defendant did on or before the 1ſt of *September* then next entirely remove take and carry away as well the ſaid walls or cribs as all others that he had created or kept and maintained in and upon the ſaid river, and the ſtones materials and foundations of all ſuch walls or cribs, ſo that the ſame ſhould not remain and obſtruct the courſe or navigation of the river, and ſhould not at any time erect or rebuild any other walls or cribs in the river to the prejudice of the navigation, then the obligation ſhould be void.

The plaintiff having declared upon the bond, the defendant craved oyer of the condition, and pleaded the general iſſue and performance of the condition, on which iſſue was joined. And at the laſt *Hereford* Aſſizes before Lord *Kenyon* the plaintiff obtained a verdict.

Abbott in the laſt term moved in arreſt of judgment, on the ground that the contract diſcloſed in the condition of the bond was an illegal contract and could not be enforced in a court of juſtice. That, as the plaintiff was directed to proſecute the defendant for a public nuiſance, the taking of a bond to his own uſe for forbearing to proſecute might be an inſtrument of colluſion or oppreſſion in the hands of the plaintiff. That though a conſtable might take ſureties for keeping the peace for an affray committed in his own view, the ſureties muſt be taken to the uſe of the king. *Sharrock* v. *Hannemer*, *Cro. Eliz.* 375; *Dalt. Juſt. ch.* 1. *p.* 4. That even if the conſideration of this bond as far as reſpected the removal of the nuiſance were lawful, every thing required of the defendant beyond that was without conſideration. That in *Roy* v. *The Duke of Beaufort* (*b*), where a verdict had been given on a bond entered into by *Roy* not to commit any treſpaſs on the duke's royalty by ſhooting hunting or fiſhing, Lord Chancellor

Hardwicke

(*a*) Who was the clerk of the peace.

(*b*) 2 *Atk.* 190.

Hardwicke gave relief by granting an injunction to ſtay all further proceedings.

This caſe was to have been argued to day, but

The Court were all clearly of opinion that they could not arreſt the judgment.

Lord KENYON Ch. J. ſaid, the want of a conſideration to a bond affords no ground of objection; and if there were any thing illegal in this conſideration the defendant ſhould have pleaded it. In the caſe of *Roy* v. *The Duke of Beaufort* Lord Chancellor *Hardwicke* did not think that the bond was void at law, but he gave relief to the defendant on the ground that the plaintiff had made an improper uſe of it.

LAWRENCE J. The defendant might have given a bond to the plaintiff without any conſideration at all: and why may he not give a bond for a conſideration that is legal?

Rule to arreſt the judgment diſcharged.

Leiceſter for the plaintiff.

Milles, *Lane*, and *Abbott*, for the defendant.

ROE on the Demiſe of BURLTON and others *againſt* ROE.

Monday, Feb. 5th.

Ejectment againſt ſeveral tenants; the name of each was prefixed to the notice ſerved on him;—Only one rule neceſſary on motion for judgment againſt the caſual ejector.

DAMPIER moved to enter up judgment againſt the caſual ejector.

This was an ejectment againſt ſeveral tenants; but in the ſeveral copies ſerved the name of the individual tenant on whom the declaration was ſerved was prefixed to the notice inſtead of the names of all, and conſequently the perſon making the affidavit of ſervice could not ſwear that the copy of any one declaration and notice was ſerved on all the tenants. The queſtion therefore was, Whether there ſhould be ſeveral rules, or whether one would be ſufficient?

The Court were of opinion that one was ſufficient.

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DOE on the Demiſe of COLLINS *againſt* WELLER.

By a marriage ſettlement an eſtate was ſettled to the uſe of the wife for life, remainder to ſuch perſons and for ſuch eſtates as ſhe ſhould by deed or will atteſted by three witneſſes appoint, and for want of ſuch appointment reverſion to herſelf in fee: during her huſband's life ſhe made a will in purſuance of the power deviſing the eſtate to *A.* in fee; after which ſhe and her huſband executed a leaſe of part of the ſettled eſtate to the defendant, not executed purſuant to the power; and after her huſband's death ſhe received rent from the defendant: Held that ſuch leaſe was voidable only by her upon her huſband's death; and that her receipt of rent accruing afterwards was a confirmation of it againſt *A.* who claimed under her appointment by the will.

Where tenant for life grants a leaſe for years, which is void againſt the remainder-man, and the latter before he elects to avoid it receives rent from the tenant whereby a tenancy from year to year is created, yet this is with reference to the old term, and therefore a half-year's notice to quit from the remainder-man ending with the old year is good.

IN ejectment for a meſſuage the queſtion turned on this point, Whether a leaſe of the premiſes from *Charles Butcher* and *Jane* his wife (under which laſt the leſſor of the plaintiff claimed) to the defendant for twenty-one years, commencing from the 25th *March* 1780, were a valid leaſe?

It appeared that in *Auguſt* 1771 *Jane Palmer* (afterwards *Jane Butcher*) being ſeiſed in fee of the premiſes, previous to and in contemplation of her marriage with *Charles Butcher*, by leaſe and releaſe conveyed the ſame to truſtees and their heirs to the uſe of herſelf in fee until the marriage, and afterwards to the uſe of herſelf for life, remainder to the uſe of ſuch perſons and for ſuch eſtates as ſhe, notwithſtanding her coverture, ſhould by deed or will executed in the preſence of three witneſſes appoint, and for want of ſuch appointment to the uſe of herſelf in fee. The marriage took place, and the leaſe in queſtion was afterwards granted by the huſband and wife, atteſted by two witneſſes only. The huſband died about three years ago, after which the wife received rent of the defendant for the premiſes accruing after the huſband's death. The wife herſelf died on the 4th *December* 1795; and by her will atteſted by three witneſſes, and executed during the lifetime of her huſband, and prior to the leaſe to the defendant, after reciting the ſettlement and the power thereby reſerved to her, deviſed the premiſes to the leſſor of the plaintiff in fee. Since her death, the leſſor of the plaintiff, after having accepted rent from the defendant accruing after the death of Mrs. *Butcher*, gave him a half-year's notice to quit ending at *Lady-day* 1797.

Two objections were taken at the trial before Lord Chief Juſtice *Eyre* at the laſt aſſizes for *Suſſex;* 1ſt, That the leaſe by the huſband and wife of the wife's land was not void as to the wife, but merely voidable after ſhe was diſcovert; and that the wife had confirmed it by accepting rent accruing after her huſband's death. 2dly, Suppoſing the leaſe not to be valid, as not having been executed under the power reſerved to the wife, and that the leſſor of the plaintiff claiming as remainder-man under the execution of that power may elect to avoid it, yet having ſince accepted rent from the defendant whereby the latter became tenant from year to year, ſuch tenancy muſt be taken to commence from the 4th *December* 1795, when Mrs. *Butcher* died, till when the former leaſe ſubſiſted; and conſequently the notice to quit at *Lady-day* 1797 was irregular. The learned Judge overruled both the objections, and a verdict was taken for the leſſor of the plaintiff, with liberty for the defendant to move to ſet it aſide and to enter a nonſuit in caſe this Court thought either of the objections well founded.

Shepherd Serjt. accordingly moved for that purpoſe in the laſt Term upon both grounds; but

The Court, being clearly of opinion that there was no foundation for the laſt objection, and that the acceptance of the rent by the leſſor of the plaintiff had relation to the old contract and not to any new agreement (*a*), granted the rule niſi upon the firſt objection only.

Erſkine, *Marryat*, and *Beſt*, now ſhewed cauſe; and inſiſted firſt that the leaſe was abſolutely void, it not being atteſted conformably to the power, conſidering Mrs. *Butcher* merely as tenant for life at the time when the leaſe was executed. [This argument was advanced without adverting to the concluſion of the ſettlement, whereby it appeared that Mrs. *Butcher* had the reverſion in fee in her at that time. But when their attention was drawn to that circumſtance,] They contended, ſecondly, That the leſſor of the plaintiff claimed under a will executed in purſuance of the power, antecedent to the defendant's leaſe and paramount to it.

Wood contrà cited ſeveral authorities to ſhew that a leaſe by the huſband and wife of the wife's land, whereof ſhe was ſeiſed in fee, was only voidable by her after her huſband's death; and that her receipt of rent afterwards was a confirmation of the leaſe, binding herſelf and all who claimed under her. *Bro. Reſceit, pl.* 70. *Acceptance, pl.* 6. 2 *And.* 42. *Dy.* 159. *Wooton* v. *Hele*, 1 *Mod.* 291. *Goodright* v. *Straphan*, *Cowp.* 203. 4 *Vin. Abr.* 101. Now here when the leaſe was granted to the defendant the reverſion in fee was in the wife, ſubject indeed to a power of appointment in her, but which reverſion was not deveſted by her having then

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(*a*) Vid. ante 83. *Doe* v. *Watts*, and *Sykes* d. *Murgatroyde* v. ——, cited, ante, 1 vol. 161.

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then made her will, which ſhe might at any time have revoked, and could have no operation during her life.

Lord KENYON Ch. J. The reverſion in fee being in the wife at the time of the leaſe executed makes an end of this queſtion; for the leaſe being only voidable, her receipt of rent after her huſband's death confirmed it. And her will which was ambulatory till her death cannot vary the caſe; for it could have no operation during her lifetime, and any act which was afterwards done by her inconſiſtent with her will was pro tanto a revocation of it. If indeed the queſtion had turned upon the power of appointment, the leaſe not being atteſted conformably thereto, could not have been ſupported in a court of law; yet even then being granted for a valuable conſideration and merely defective in point of form, a Court of Equity would have interfered, and directed a proper leaſe to be granted. In *Rattle* v. *Popham* (*a*), though Lord *Hardwicke* in a court of law held himſelf bound to decide againſt a leaſe not duly executed according to a power reſerved, yet Lord *Talbot* preſiding in the Court of Chancery, upon a bill filed by the leſſee, decreed the leaſe to be binding on the parties, and made the defendant pay all the coſts in law and equity (*b*).

Per Curiam, Rule abſolute.

(*a*) 2 *Stra.* 992.

(*b*) It ſeems in that caſe from what is ſaid in 2 *Burr.* 1147., that Lord *Talbot* held the leaſe to be warranted by the power, ſaying it was a blundering, but not a defective, execution of it. But ſee the caſe of the Dean and Chapter of *St. Paul*'s to this point mentioned at the end of the caſe of *Alexander* v. *Alexander*, 2 *Vez.* 645, 6.

Monday, Feb. 5th.

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If *A.* have received money from *B.* to pay to *C.*, and the queſtion be Whether *A.* were the agent of *C.* for that purpoſe, *A.* may be called as a witneſs to prove the agency.

ON the trial of this action of aſſumpſit, at the laſt *Newcaſtle* aſſizes before Mr. Baron *Thomſon*, the only queſtion was, Whether one *Barber* were a competent witneſs. He had been the agent of the plaintiff, and, as aſſerted by the defendant, continued to be ſo at the time when he received a ſum of 200 *l.* (the money in diſpute) from the defendant, and received the money in that character. The plaintiff admitted the receipt of the money by *Barber*, but denied his agency at the time of the receipt.

The defendant called *Barber* to prove the agency, but he was objected to on the ground of intereſt. The defendant's counſel ſaid that his intereſt was equal; for if the plaintiff recovered, the defendant might maintain an action againſt him to recover back

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back the 200*l.*; if the defendant recovered, the plaintiff might ſue *Barber* for the ſame ſum; ſo that either way *Barber* was liable, and came to charge himſelf.

But the plaintiff's counſel argued that *Barber*'s intereſt was ſtronger in favour of the defendant, becauſe the defendant would be entitled to recover the coſts of this action as well as the money itſelf from *Barber*, if *Barber* had received this money under a miſrepreſentation of his own character. The learned Judge rejected the witneſs and ſaved the point. A verdict having been given for the plaintiff, a motion was made in the laſt term by

Chambre and *Park* to ſet it aſide, on the ground that the witneſs ought to have been received. Cauſe was now ſhewn againſt that rule by

Law and *Holroyd*; who urged the ſame ground of objection they had taken at the trial; and mentioned the caſes of *Green* v. The *New River* Company (*a*), and *Thompſon* v. *Bird* (*b*); in the former of which the Court ſaid that the inſtance of the ſervant of a tradeſman being permitted to prove the delivery of goods was an exception to the general rule that an intereſted perſon might be a witneſs; and in the latter, which was an action on a policy of inſurance, the captain of the veſſel was holden not to be an admiſſible witneſs to diſprove barratry, by ſhewing that the barratrous acts were done by the conſent and direction of the owners, without a releaſe from the underwriters.

But *The Court* were of opinion that the objection to the admiſſibility of the witneſs was not well founded, becauſe in any event the witneſs ſtood indifferent in point of intereſt between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant (*c*). That if ſuch an objection

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(*a*) *Ante*, 4 vol. 589.

(*b*) Sittings before Lord *Kenyon*, after *E.* 35 *Geo.* 3. *Eſpin.* 339.

(*c*) EVANS *v.* WILLIAMS and others, Sittings at *Guildhall* after *Trinity* term 28 *G.* 3. cor. Lord *Kenyon*.

Aſſumpſit for money paid to the uſe of the defendants. The defendants were owners of the *Hinchinbroke Eaſt Indiaman*, whoſe Captain, Mr. *Maxwell*, borrowed money of the plaintiff, as the plaintiff alleged, for the uſe of the ſhip, but according to the defendants' caſe for the uſe of the Captain himſelf. The plaintiff called Mr. *Maxwell*, who was objected to, as being intereſted to diſcharge himſelf by throwing the *onus* upon his owners; to this it was anſwered that if ſo the owners had a remedy over againſt him, ſuppoſing the money came to his hands; and that he was perfectly indifferent, being liable to the plaintiff upon his own bill of exchange on the one hand, and to the owners on the other.

Lord KENYON Ch. J. I think the objection has been well anſwered: but to what extent the witneſs ſhould be received, is another queſtion. This does not go on the ground of *Maxwell* being a witneſs of neceſſity:

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objection as the preſent were to prevail, it might exclude brokers who had effected policies of inſurance; and that it would be difficult hereafter to draw any certain line. And they made the

Rule abſolute.

Tueſday, Feb. 6th.

The Counteſs of STRATHMORE *againſt* A. ROBINSON BOWES and others, and A. ROBINSON BOWES and others *againſt* The Counteſs of STRATHMORE and others.

A. by will deviſed *all his freehold and copyhold,* &c. in truſt for certain purpoſes, and afterwards purchaſed new lands, and then made a codicil whereby after reciting that he had deviſed all his freehold and copyhold to the truſtees named, he revoked the ſame ſo far as related to two of the truſtees named, and deviſed his *ſaid* lands &c. to the other truſtees upon the ſame truſts; and concluded with declaring the codicil to be part of his will: held that ſuch a republication of the will would not operate to paſs the afterpurchaſed lands.

See Pigott v. Waller 7. Ves. Jun. 98.

GEORGE BOWES of *Streatlam Caſtle* in the county of *Durham* Eſq. deceaſed, by his laſt will dated 7th *February* 1749, properly atteſted for deviſing real eſtates, gave and deviſed all his freehold and copyhold manors meſſuages lands tenements and hereditaments whatſoever, not held in mortgage or in truſt for any other perſons, nor held by any leaſe or leaſes for lives, to his wife *Mary Bowes*, *Edward Gilbert* Eſq. *Elizabeth Bowes*, *Jane Bowes*, and his friends the honourable Sir *H. Smithſon* Bart. and *T. Rudd*, their heirs and aſſigns, to the uſe of them their heirs and aſſigns, upon ſuch truſts and to and for ſuch ends intents and purpoſes as are therein aftermentioned, that is to ſay, in caſe he ſhould have any ſon or ſons born in his lifetime or after his death, that the ſame ſhould be in truſt for his firſt and other ſons ſucceſſively in tail male, and for default of ſuch iſſue then in truſt for his daughter *M. E. Bowes* for her life, without impeachment of waſte; and after the determination of that eſtate, in truſt during her life to ſupport the contingent remainders, and after her death then in truſt for her firſt and other ſons ſucceſſively in tail male; and in default of ſuch iſſue then in truſt for all and every the

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ceſſity; for courts have very ſeldom decided on ſuch a ground. I think originally the plea of neceſſity was only admitted in caſes upon the ſtatute of Hue and Cry. I decide this caſe on the ground that the witneſs ſtands indifferent between the parties; for whichever way the queſtion goes here, he is equally anſwerable. If I recollect right, this point has been decided in the caſes of ſubtraction of tithes.

Verdict for plaintiff.

In the following term a motion was made for a new trial on other points in the cauſe, but not on this; but a new trial was refuſed after argument.

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daughters of the ſaid *M. E. Bowes* as tenants in common, and the heirs of their reſpective bodies, with croſs remainders in tail general to the ſurviving daughter or daughters as tenants in common in caſe of one or more of the daughters dying without heirs of their reſpective bodies; with divers remainders over. After making the ſaid will, and before making the codicil after mentioned, the deviſor purchaſed ſeveral eſtates, and particularly in 1754 he purchaſed an undivided third part of a certain freehold eſtate in the county of *Durham*, and was ſeiſed in fee thereof at the time of his death. The deviſor afterwards made a codicil to his ſaid will, dated 20th *October* 1758, and properly executed and atteſted to paſs real eſtates, in which (after reciting that "by his laſt will "and teſtament, dated the 7th of *February* 1749, he had given "and deviſed all his freehold and copyhold manors, &c. to his "wife *Mary Bowes*, her father *E. Gilbert*, his ſiſter *E. Bowes*, "and his ſiſter *Jane Bowes*, and his friends the honourable Sir "*H. Smithſon* Bart. and *T. Rudd*, their heirs and aſſigns, and to "the uſe of them their heirs and aſſigns, upon the truſts intents "and purpoſes therein mentioned,) he revoked all his above deviſe, ſo far as it related to the above Sir *H. Smithſon* (then Earl "of *Northumberland)* and *T. Rudd* and their heirs; and then "he gave and *deviſed his ſaid lands tenements and hereditaments* "unto the above named *Mary Bowes* his ſaid wife, *E. Gilbert*, "and his ſiſters *E. Bowes* and *J. Bowes*, their heirs and aſſigns, "upon the ſame truſts intents and purpoſes as he had given and "deviſed the ſame by his ſaid laſt will. He revoked the legacies "of 500 *l.* each, which he had given to the ſaid Sir *H. Smithſon* "and *T. Rudd*; and alſo revoked the executorſhip of the ſaid "Earl of *Northumberland* and *T. Rudd* of his ſaid laſt will, and "the guardianſhip of his daughter deviſed to the ſaid Earl of "*Northumberland;* and confirmed and appointed his wife *Mary* "*Bowes* the ſaid *E. Gilbert* and his ſaid ſiſters *E.* and *J. Bowes* "executors of his will; and revoked the truſteeſhip of the ſaid "Earl of *Northumberland* and *T. Rudd* for laying out the ſavings "of the produce of his real and perſonal eſtates in the purchaſe "of lands; concluding thus, I do hereby make and declare "this codicil to be part of my laſt will and teſtament; as witneſs," &c. The deviſor afterwards died leaving the ſaid *Mary Eleanor Bowes* his only child and heireſs at law.

The Lord High Chancellor ordered that the above caſe ſhould be made for the opinion of the Judges of this Court, and that the queſtion

thereupon

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thereupon ſhould be, Whether the codicil dated the 20th day of *October* 1758 made by the teſtator *George Bowes* was a republication of his will, dated the 7th day of *February* 1749, with reſpect to the eſtate purchaſed after the date of the ſaid teſtator's will?

This queſtion was argued in the laſt Term by *Chambre* in the affirmative, and *Raine* contrà; and now by *Law* in the affirmative; *Erſkine* was to have argued e contrà.

Arguments for the affirmative of the queſtion, Whether the codicil was a republication of the will ſo as to paſs the after-purchaſed lands?

The Court will not preſume that the teſtator meant to die inteſtate as to this part of his property, eſpecially when he made a teſtamentary diſpoſition after the acquiſition of it. It is a general rule that a codicil properly atteſted to paſs real property, referring to an antecedent will, though not annexed thereto, is in law a republication of the will, ſo as to give the ſame date to it as is given to the codicil. And here the deviſor by his codicil directs that it ſhall be taken to be part of his laſt will and teſtament. *Acherley* v. *Vernon*, *Com. Rep.* 381. 3 *Bro. P. C.* 107. *Potter* v. *Potter*, 1 *Vez.* 437. *Gibſon* v. *Montfort*, 1 *Vez.* 489. 493 (*a*). *Jackſon* v. *Hurlock*, *Ambl.* 487. *Heylin* v. *Heylin*, *Cowp.* 130. *Doe* v. *Davy*, *ib.* 158. and *Barnes* v. *Crow*, 4 *Bro. Ch. Rep.* 2. 1 *Vez.* jun. 486. S. C. and other caſes there cited. But it will be argued that the teſtator by the particular terms of the codicil has confined the operation of it to the eſtates which he had at the time of making his will, in reſpect to which alone the codicil is a republication of the will: but no ſuch intent is expreſſed, and none can be implied in law contrary to the general rule. Where a man deviſes all his lands, his general intent is to paſs as well his after-purchaſed land as that of which he is poſſeſſed at the time. It is only by a technical rule of law that a will cannot paſs after-purchaſed lands. In furtherance however of the intent the Courts have been ſolicitous to lay hold of the circumſtance of an after-made codicil to give that effect to the will where the terms of it are general enough to include all his eſtates; and all that is required ſince the ſtatute of frauds is, that the codicil referring to and republiſhing the will ſhall be atteſted by three witneſſes in order to paſs real property. If indeed, as was ſaid by Lord *Mansfield* in *Heylin* v. *Heylin*, one deviſes lands by name, and purchaſes new lands, and republiſhes his will, the

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(*a*) This is the ſame caſe as that reported by the name of *Gibſon* v. *Rogers*, *Ambl.* 93.

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the new lands will not paſs, becauſe the will ſpeaks only of the particular lands. But, ſays he, if the teſtator had given *all* his lands, a republication would affect the new purchaſed lands, becauſe it is the ſame as if the teſtator had made a new will. Now here the words of the will are ſufficient to paſs every eſtate, for he deviſes *all* his freehold and copyhold manors &c. And in the codicil republiſhing his will, there are no words to reſtrain the generality of the will, or to ſhew his intention to be not to paſs the after-purchaſed lands. The codicil begins by reciting, "Whereas I have given and deviſed all my freehold and copy-"hold manors," &c. to the truſtees named: this ſhews that it was in his contemplation to paſs all that he had. There are no excluſive words ſhewing that his intention was confined to paſs thoſe eſtates only of which he was ſeiſed at the time of making his will: but the words uſed are in themſelves ſufficient to paſs all the eſtates which he then had. He then proceeds thus, "I hereby revoke all my above deviſe ſo far as it relates to" the two truſtees named; this therefore operates as a cofirmation of the reſt of the will. But then he deviſes his SAID lands &c. upon the ſame truſts as before: and this it is contended ſhews his intent to be only to paſs the lands which he had before deviſed under the truſts of the will. But the word "*ſaid*" muſt rather refer to the antecedent before expreſſed in the codicil, which is *all* my freehold &c, according to *Winch* 93, words of relation will never contract that which has been put down before. If inſtead of uſing the word "*ſaid*" he had repeated the deſcription of his property before expreſſed, there could have been no doubt: but this muſt have the ſame conſtruction, according to the maxim verba relata ineſſe videntur. If indeed the deviſor had before mentioned a particular deſcription of lands by name, then the word *ſaid* having relation thereto might have been taken to confine the operation of the codicil to thoſe particular lands: but the relative muſt be co-extenſive with the antecedent. The like argument applies to the ſubſequent word "*ſame.*" But further, it appears by the codicil that he muſt have intended to paſs his after-purchaſed land; for he revokes the truſteeſhip as to the ſame two perſons "for laying out the ſavings of the produce of his real and perſonal eſtates," &c; by which it is plain he intended the ſavings of *all* the eſtates which he then had, and not merely of thoſe which he had at the time of making his will. This ſhews what he meant by *all* his lands in the recital at the beginning. But if there be any doubt on theſe grounds, at all events the

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the general words at the concluſion of the codicil, "I do hereby "make and declare this codicil to be part of my laſt will and "teſtament," are alone ſufficient to incorporate the two inſtruments, and to paſs the after-purchaſed lands as by a will bearing the ſame date as the codicil.

Arguments e contrà. The codicil operated as a republication of the will ſo far only as to what paſſed by the will itſelf; becauſe by the very terms of the codicil it's operation is confined to ſuch lands only as were before included in the truſt to Sir *H. Smithſon* and *Rudd*. And admitting that the word SAID refers to the recital at the beginning of *all his freehold and copyhold manors* &c. yet that is expreſsly confined to thoſe eſtates which he had by his will deviſed to the former truſtees, and which conſequently did not include the after-purchaſed eſtate. Admitting this to be a queſtion of intention, the queſtion will ſtill be, Whether he intended to paſs the after-purchaſed eſtate by referring in terms to the lands which he had at the time of making his will? and ſuppoſing he had no ſuch intent he could not have found words more apt to exclude the after-purchaſed lands. Nor is it improbable to ſuppoſe that he meant to leave ſome part of his eſtate in the diſcretion of his heir at law. In 3 *Com. Dig.* tit *Deviſe*, (E. 4.) ſpeaking of caſes where a new publication is ſufficient, it is ſaid, "If a man deviſe all his lands in *A*, and afterwards "purchaſe other lands; if he make a new publication of his "will, *and uſe words which ſhew his intent that the lands newly "purchaſed ſhall paſs by it*, it is ſufficient to paſs them; for "the words in the will were apt for that purpoſe." But ſpeaking afterwards (*pl.* 5.) of caſes where a new publication is not ſufficient, it is added, "If a teſtator after a new purchaſe annexes a new "codicil for legacies, this is not ſufficient to paſs the land without "words for ſuch purpoſe." How then in this caſe can the codicil operate as a republication of the will, ſo as to paſs the after-purchaſed land, when it was only made for the ſpecial purpoſe of ſtriking out two of the truſtees who were named in the will? As to the caſe cited of *Ackerley* v. *Vernon* (*a*), it appears from what is ſtated by Lord *Hardwicke* in *Gibſon* v. *Rogers* (*b*) that the minute book of the Houſe of Lords ſhews the opinion of the judges to have been that the codicil, which had revoked part of the former deviſes, *and thereby deviſed ſome after-purchaſed lands*, was to be conſidered as in-

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(*a*) *Com. Rep.* 381. (*b*) *Ambl.* 97.

corporated

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corporated in the will and conſequently a confirmation of it. From thence it appears that the codicil contained an expreſs recognition of the after-purchaſed lands. In *Barnes* v. *Crow* (*a*) the teſtator in the original will had deviſed all his eſtates in the county of *Kent that he might die ſeiſed or poſſeſſed of*; and though in point of law that would not have paſſed after-purchaſed land by force of the will itſelf, yet when the will was republiſhed by the codicil after the purchaſe made, it neceſſarily in the very terms of it applied to the land purchaſed before the making of the codicil.

Lord KENYON Ch. J. It was owing to the preſſing importunity of the counſel, and not on account of any difficulty that preſented itſelf to us, that this caſe ſtood for a ſecond argument; for to be ſure there is no doubt whatever in the caſe. It is clear that a codicil, confirming a will of lands in general words, will paſs lands purchaſed between the making of the will and the codicil. But here the queſtion is, Whether it was the intention of the deviſor to paſs by the codicil any thing more than would have paſſed by the will itſelf? Now what is this caſe? the teſtator gave all his real and copyhold eſtates to ſeveral truſtees by his will, in words ſufficiently comprehenſive to carry all the eſtates of which he was then ſeiſed. Then he made a codicil, not to extend his will, but only to revoke ſo much of it as veſted the eſtates in ſome of the truſtees whom he had named in his will, and then he gave his *ſaid lands* &c, that is, thoſe lands which he had before given by his will, to the reſt of the truſtees.

GROSE J. In *Acherley* v. *Vernon* there was nothing reſtrictive: but here the words of the codicil are reſtrained to the lands that the deviſor had at the time of making his will. The words are, "I deviſe my ſaid lands &c, upon the ſame truſts &c, as "I have given and deviſed the ſame by my ſaid will:" but he had not before deviſed the lands in queſtion, for he had them not at the time of making his will.

LAWRENCE J. In the caſe of *Heylin* v. *Heylin* (*b*), Lord *Mansfield* ſaid, "If one deviſe lands by the names of *B*, *C*, and *D*, and purchaſe new lands, and republiſh his will, the republication does not concern ſuch new lands, becauſe the will ſpeaks only of the particular lands *B*, *C*, and *D*." So here the teſtator by his codicil gave the *ſaid* lands that he had before given by his will;

(*a*) 1 *Vez.* jun. 486.

(*b*) *Cowp.* 132.

and

and that has the ſame operation as the enumeration of particular lands in the caſe put by Lord *Mansfield*.

The following certificate was afterwards ſent to the Lord Chancellor.

"We have heard counſel in this caſe; and we are of opinion that the codicil was not a republication of the will ſo as to extend the operation of the will to the real eſtates purchaſed after the will was executed. It extends to the eſtates deviſed by the will, and no further.

Feb. 10th 1798.

Kenyon,
W. H. Ashhurst,
N. Grose,
S. Lawrence."

Affirmed in the Lords on the opinion of the Judges 29. June 1801.

Tueſday, Feb. 6th.

Barwick on the Demiſe of the Mayor and Aldermen of Richmond in Yorkshire *againſt* Thompson and others.

If *B.*, claiming under *A.*, let lands for a year to *C.*, and die, and *A.* afterwards bring an ejectment againſt *C.*, *C.* cannot diſpute the title of *A.*

At the trial of this ejectment, which was brought to recover certain premiſes at *Richmond*, on a demiſe ſtated to have been made to the plaintiff "by the mayor and aldermen of the borough of *Richmond*, guardians and governors of the poſſeſſions, revenues, hereditaments, and goods of the Free Grammar School of the burgeſſes of the borough and town of *Richmond* in *Yorkſhire*," a verdict was taken for the plaintiff, ſubject to the opinion of this Court on a caſe in ſubſtance as follows.

King *Henry* the Seventh by letters patent (dated 19 *Hen.* 7.) confirmed to the free burgeſſes certain lands &c, theretofore granted to them by king *Henry* 6. Queen *Elizabeth* by letters patent (*an.* 9 *Eliz.*) granted and ordained that for the future there ſhould be a ſchool, called The Free Grammar School of the Burgeſſes of the Borough and Town of *Richmond* &c; that there ſhould be one maſter; and in order that the lands &c, to be granted and appointed for the maintaining of the ſchool, might be the better governed for the continuance of the ſame ſchool ſhe willed and ordained that in future the four bailiffs of the borough for the time being ſhould be and ſhould be called Governors of the poſſeſſions, revenues, hereditaments, and goods of the ſaid ſchool; ſhe alſo appointed the then bailiffs of the borough to be guardians and governors of the ſchool, and ordained that the ſame governors during

during the time they ſhould be bailiffs, and their ſucceſſors bailiffs of the borough governors of the ſaid poſſeſſions &c, ſhould be a body corporate and politic for ever, by the name of "The guardians and governors of the poſſeſſions, revenues, hereditaments, and goods, of the free grammar ſchool." She alſo willed and granted that the ſaid governors and their ſucceſſors might plead and be impleaded in any action &c; might purchaſe and take lands for the ſupport and maintenance of the ſchool; might appoint a maſter whenever a vacancy ſhould happen, and might make ſtatutes and ordinances touching the direction of the ſchoolmaſter and his ſalary, and the diſpoſitions of the rents and revenues of their lands &c. The ſame letters patent alſo contained a grant to the burgeſſes of the borough of *Richmond* and their ſucceſſors of a fair to be holden on a certain day. Queen *Elizabeth* by another charter (*an.* 19 *Eliz.*) incorporated the town of *Richmond* by the name of "The alderman and burgeſſes of the borough of *Richmond;*" giving them power by that name to purchaſe and take lands, to plead and be impleaded; ordaining that there ſhould be one alderman and twelve burgeſſes only; granting to the ſaid alderman and burgeſſes and their ſucceſſors that they ſhould have all and ſingular cuſtoms, privileges &c, granted to them or their progenitors by whatever name or names, and ſuch lands as the men and burgeſſes of the town of *Richmond* ever had or enjoyed by whatever name &c; and giving them power to appoint conſtables and other officers in the town as the men and burgeſſes of the town had been accuſtomed to do. King *Charles* the Second by a charter (*an.* 20 *Car.* 2.) incorporated the town by the name of "The mayor and aldermen of the borough of *Richmond;*" willing and ordaining that all grants, gifts, powers, intereſts, and authorities whatſoever, of or concerning any uſe, through means of piety or charity, or any other uſe which at any time before had been ſettled or veſted in the alderman of the borough, or in the alderman and burgeſſes, or which had been exerciſed or enjoyed by them ſhould be veſted in the mayor, aldermen, and burgeſſes, and their ſucceſſors; and confirming to the mayor, aldermen, and burgeſſes of the ſaid town, and alſo to the free burgeſſes of the ſaid town all lands &c, and all liberties, privileges &c, which the alderman and burgeſſes of the town or any of their predeceſſors had had or enjoyed &c. The bailiffs of the ſaid borough or town were officers continued and in being after the acceptance of the charter of the 19th of queen *Elizabeth*, and are mentioned in certain entries made reſpecting the ſchool by the

the aldermen and burgeſſes inſerted in one of their corporation books. Both before and after the granting of the charter of *Charles* the Second to the year 1706, leaſes for years by deed were from time to time granted of different parts of the land now in queſtion, with others, in which leaſes the bailiffs for the time being of the borough were joined with the aldermen and burgeſſes, or with the mayor and aldermen, as demiſing with the general conſent of all the reſt of the burgeſſes of the borough, under the yearly rents payable to the reſpective leſſors and their ſucceſſors; with a proviſo that if the ſame ſhould be unpaid, after being demanded by the bailiff of the ſaid free ſchool, and no ſufficient diſtreſs found upon the premiſes, then it ſhould be lawful to the reſpective leſſors and their ſucceſſors to re-enter &c. Previous to the granting of the charter of the 20 *Car.* 2. the bailiffs for the time being accounted with the then aldermen and the reſt of the burgeſſes in different years for all their receipts of rents of the ſchool lands, crediting themſelves for ſalaries paid to the maſter and uſher for repairs and taxes, paying over to or receiving for their ſucceſſors the balance or deficiency yearly, and amongſt other things, they charged therein the ſum of 8*s.* as their allowance, all which accounts are ſigned by the alderman for the time being, and examined and allowed. And in the year 1677-8 after the granting of the charter of the 20th *Car.* 2. there appears an account of the bailiffs allowed, and ſigned by the then mayor, in which they accounted for certain fines received by them on granting new leaſes of the lands belonging to the grammar ſchool, and the rents thereof, which (it thereby appears) they paid for re-building the ſchool, and the maſter and uſher for their ſalaries.

In *June* 1704 an order was made by the mayor and aldermen "truſtees of the free grammar ſchool," &c, ordering an addition of 10*l.* *per annum* to be made to the maſter's ſalary during the continuance of the then leaſes of the ſchool, and ordering the chamberlains of the borough to pay the ſame, which ſum the chamberlains paid. In *October* 1718 the mayor and aldermen as "keepers and governors of the poſſeſſions, revenues, hereditaments, and goods of the free grammar ſchool," &c. with the conſent of the common council exchanged ſome of the ſchool lands for other lands with Mr. *Copley*. In 1722 the mayor and aldermen as "guardians and governors," &c, elected Mr. *Cloſe* to the maſter of the ſchool; in 1732 they as "guardians," &c, made ſeveral leaſes of the ſchool lands; and in 1750 they made certain ordinances and bye-laws for the ſchool, one of which was that the maſter for the time being ſhould receive the rents and profits of the ſchool lands. After the death of Mr. *Cloſe* in 1750, they as guardians and governors &c elected Mr. *Temple* to be maſter, who continued in that office until his death in *April* 1795, ſince which time no ſucceſſor has been appointed. During Mr. *Temple*'s lifetime he let the ſchool lands, as the leaſes expired, to ſeveral tenants from year to year, and (among the reſt) the lands in queſtion to the defendants, who paid rent to Mr. *Temple* as long as he lived. In 1752 the mayor and aldermen ſold a parcel of wood then growing upon the ſchool lands, and with the produce repaired the ſchool. There are now officers called chamberlains, who receive rents and act as bailiffs for the mayor and aldermen of the borough. The mayor and aldermen gave regular notice to the defendants to quit. The above facts were proved on the part of the plaintiff.

Raine, on behalf of the plaintiff, made a preliminary objection to the defendants being permitted to diſpute the title of the leſſors of the plaintiff, becauſe it appeared by the caſe that they claimed under the late Mr. *Temple* who was appointed by the leſſors of the plaintiff; and that this caſe therefore came within the reaſon of the common rule, that a tenant ſhall not be allowed to diſpute the title of the landlord under whom he holds.

Holroyd, contrà, anſwered that the defendants did not hold under the leſſors of the plaintiff with whom they had no connexion, but under the late Mr. *Temple*; but that even if they held under the mayor and aldermen of *Richmond* there was no reaſon why they ſhould not be allowed to inquire into the validity of their title, as all the evidence of title was given by the plaintiff himſelf; and that in this reſpect this caſe differed from the ordinary one where a tenant is not ſuffered to bring evidence to impeach his landlord's title, the evidence given by the leſſors of the plaintiff here having negatived their own title.—He was then proceeding to ſhew that the mayor and aldermen of *Richmond* formed a diſtinct corporation from that of the guardians and governors of the free ſchool, in which latter the lands in queſtion were veſted; but

The Court were of opinion that as the defendants held under the late Mr. *Temple*, who was appointed by the mayor and aldermen of *Richmond* in the characters of guardians and governors of the free ſchool, they ought not now to diſpute the title of the leſſors of the

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the plaintiff, and that it was immaterial whether the defendants held immediately under the mayor and aldermen, or under the late maſter who claimed under the mayor and aldermen. They alſo intimated a very ſtrong opinion that the leſſors of the plaintiff were entitled to recover on the merits of the caſe; for that though it did not diſtinctly appear how the mayor and aldermen became guardians and governors of this ſchool inſtead of the bailiffs who were incorporated by the charter of *Elizabeth*, or how the one corporation was connected with the other, yet it appeared that ſince the year 1704 the mayor and aldermen had on all occaſions acted as the truſtees, and had received the rents and profits of the lands in queſtion either by themſelves or their agent the maſter for the time being. That after ſuch a length of time a new charter might even be preſumed. And that, without minutely enquiring into the antiquity of a title, a clear and undiſturbed poſſeſſion for 20 years was in itſelf a ſufficient title in an ejectment.

Poſtea to the plaintiff.

Tueſday, Feb. 6th.

MARY SKERRATT *againſt* OAKLEY.

A. by will bequeathed to his wife (beſides ſome other legacies) a leaſehold eſtate at *N.* for her life, and a leaſehold eſtate at *W.* to *B.*; and by his codicil he directed that the bequeſts to his wife in his will ſhould be in full of all claims ſhe ſhould be entitled to on his real or perſonal eſtate (except the eſtate for life of his wife in the premiſes at *W.*); held that the wife was not entitled to the eſtate at *W.* by the codicil.

THIS was an action of covenant brought by the plaintiff as aſſignee of *John Skerratt* for the rent of ſome leaſehold premiſes at *Wrentnall*, under a demiſe made by *John Skerratt* and *T. Blantern* for 21 years at the yearly rent of 130 *l.* payable to *J. Skerratt* his executors &c, and which leaſe came to the defendant by aſſignment. The declaration, after ſtating the above facts, ſtated that *J. Skerratt* by will dated 19th *October* 1795 bequeathed to his wife (the plaintiff) 700 *l.* to be paid to her within twelve months after his deceaſe out of his perſonal eſtate not therein particularly bequeathed, and appointed his wife and two other perſons executrix and executors of his will. That on the ſame day he made a codicil, by which he willed and directed that the 700 *l.* bequeathed to his wife and other bequeſts made to her under his will ſhould be in full of all claims and demands to which ſhe ſhould be entitled out of his real or perſonal eſtate, except the eſtate for life of his wife and her aſſigns in the premiſes at *Wrentnall*, any thing in his foregoing will to the contrary thereof contained in any wiſe notwithſtanding. It then ſtated the death of *J. Skerratt*, the proving of his will, and the aſſent of the executors to the bequeſt of the premiſes at *Wrentnall* to the plaintiff, whereby ſhe became poſſeſſed of the reverſion; and the breach alleged was the non-payment of 195*l.* for one year and a half's rent due the 25th of *March* 1797.

The defendant craved oyer of the will and codicil of *J. Skerratt*, and then demurred generally to the declaration. By the will the teſtator after giving to his wife 700*l.* to be paid to her and her executors, &c, out of his perſonal eſtate not thereinbefore particularly bequeathed, and the yearly intereſt of the ſum of 1200*l.* for her life, gave and deviſed to her for her life certain premiſes in *Northwood* which he held for lives under *T. Blantern*; and as for his leaſehold eſtate at *Wrentnall*, which he held under *R. Smythe*, and alſo his eſtate at *Northwood*, after his wife's deceaſe, and all the reſidue and remainder of his real and perſonal eſtate, and alſo the ſum of 1200*l.* after his wife's death, he gave and deviſed one moiety to *G. Walmſley* his heirs executors &c, and one moiety of the other moiety to *J. Gough* his heirs executors &c, and the other part of the other moiety to *E. Gough* for her life, remainder to *J. Gough* his heirs executors &c. By the codicil he directed that the 700*l.* bequeathed to his wife and other bequeſts made to her by his will ſhould be in full of all demands to which ſhe ſhould be entitled in or out of his real or perſonal eſtate, *except the eſtate for life of his wife and her aſſigns in the premiſes at* Wrentnall *aforeſaid*, any thing in his foregoing will to the contrary thereof contained in any wiſe notwithſtanding.

The plaintiff joined in demurrer.

Gaſelee, in ſupport of the demurrer, contended that the plaintiff was not aſſignee of the eſtate at *Wrentnall* under the will and codicil of her late huſband *J. Skerratt*. As this eſtate is expreſsly given to *G. Walmſley* by the will, it will be incumbent on the plaintiff, in order to entitle herſelf to recover in this caſe, to ſhew that that bequeſt was revoked by the codicil, and that the eſtate was bequeathed to the plaintiff by the codicil. Now to ſupport that poſition ſhe muſt contend that this eſtate was by implication given to her by the codicil: but there can be no implied deviſe or bequeſt except in caſes where (but for the implication) no other perſon can take. 13 *Hen.* 7. *p.* 17. *pl.* 22; *Horton* v. *Horton*, *Cro. Jac.* 75; *Doe* v. *Fonereau*, *Dougl.* 492. But it is not neceſſary that the wife ſhould take in this caſe, becauſe if ſhe be not entitled the perſons to whom the eſtate is expreſsly bequeathed by the will will take. Beſides an attentive peruſal of the codicil will manifeſtly

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Skerratt *againſt* Oakley.

feſtly ſhew that the teſtator, inſtead of intending to give any thing to the wife by the codicil in addition to what ſhe took under the will, made the codicil for the purpoſe of limiting the claims of the wife: it is a codicil of reſtraint, not of bequeſt, as far as reſpects the wife. By the codicil he directed that what he had given to his wife by the will ſhould be in full of all claims ſhe might have on his real or perſonal eſtate, "except the eſtate for life of his wife in the premiſes at *Wrentnall*." This therefore at the moſt is merely a falſe recital, the teſtator not having given her the eſtate at *Wrentnall*, though he had given her the eſtate at *Northwood*. But a falſe recital cannot give her any thing; *Bamfield* v. *Popham*, 1 *P. Wms.* 54; *Right* v. *Hammond*, 1 *Str.* 427; and *Holder* v. *Holder*, 2 *Eq. Caſ. Abr.* 359. It is evident that *Wrentnall* is merely a miſtake, and was ſubſtituted in the codicil for *Northwood*.

Manley, contrà, contended that the plaintiff took the eſtate at *Wrentnall* under her huſband's codicil. That it was manifeſt by that codicil that he intended to give her ſomething to which ſhe had no right under the will, by his adding at the concluſion, "any thing in his foregoing will to the contrary thereof notwithſtanding." That the recital in the codicil ſhewed an intention in him to give this particular eſtate to his wife. That it did not appear that the teſtator had made any miſtake in uſing the word *Wrentnall* in the codicil; and that if there were any ſuch miſtake, the court could not rectify it. *Smith* v. *Mailland*, 1 *Vez.* jun. 364.

Lord Kenyon Ch. J. This caſe muſt be decided according to the intention of the teſtator, as that intention is to be collected from the ſeveral parts of the will and the codicil taken together. Now it is impoſſible to read them without ſeeing that the word *Wrentnall* was written in the codicil inſtead of the word "*Northwood*:" in reciting in the codicil what he had given by his will, the teſtator made that evident miſtake.

Grose J. The teſtator did not mean to give his wife any thing by the codicil: his intention was to prevent her claiming dower or thirds, as he ſuppoſed ſhe would be entitled to them without ſome ſuch reſtriction; and in effecting this he uſed the word "*Wrentnall*" for "*Northwood*" in the recital in the codicil.

Per Curiam, Judgment for the defendant.

Buck and others Executors of Buck *againſt* Tyte.

Wedneſday, Feb. 7th.

Where an action was brought by executors on a bond given by the defendant to their teſtator for ſecuring an annuity, and upon a plea of non eſt factum they obtained a verdict and judgment, and levied execution thereon, the Court held this not a caſe where they could give relief upon a ſummary application under the annuity-act, for a defect in the memorial.

A Rule was obtained calling on the plaintiffs to ſhew cauſe why the judgment ſigned in this cauſe and the execution iſſued and executed thereon ſhould not be ſet aſide, and the money levied by the ſheriff be reſtored to the defendant.

It appeared that in *February* 1791 the defendant as ſurety for one *Birch* became jointly and ſeverally bound with him to the teſtator, and executed a certain indenture, bond, and warrant of attorney, for ſecuring an annuity of 100*l. per annum* in conſideration of 600*l.* paid by the teſtator to *Birch*; which annuity it was agreed between them might be redeemed on certain terms ſpecified in ſome of the inſtruments. The teſtator died in 1795, after which the plaintiffs commenced an action againſt the defendant on his bond to recover the arrears of the annuity, to which he pleaded non eſt factum, and defended the action; and the plaintiffs obtained a verdict and judgment, and ſued out execution and levied thereon. This rule was obtained on two grounds; 1ſt, becauſe the agreement for redemption was not ſtated in the memorial. 2dly, Becauſe the grantor had not received the full conſideration ſtated, which latter fact however was denied in the affidavits filed on the part of the plaintiffs.

Chombre, upon ſhewing cauſe, objected to the Court's entertaining juriſdiction upon the ground of the defect in the memorial under theſe circumſtances. This, he obſerved, was not a caſe where the plaintiffs had entered up judgment upon a warrant of attorney for ſecuring the annuity, in which caſe this Court would have had a ſummary juriſdiction to ſet it aſide upon a defective memorial under the 2d *ſect.* of the 17 *Geo.* 3. *c.* 26. Nor is it a caſe within the 4th *ſect.* whereby if any part of the conſideration be retained, or for other fraudulent cauſes there mentioned, the grantor is authoriſed "to apply to the court in which any action "is brought for payment of the annuity, or judgment entered, by "motion, to ſtay proceedings on the judgment or action; and "if it ſhall appear to the Court that ſuch practices have been "uſed, they ſhall order the bond &c to be cancelled, and the "judgment, if any has been entered, to be vacated." The wording of this laſt clauſe neceſſarily refers to a period pending the ſuit, and not after it is concluded and judgment executed; for the motion is to be *to ſtay the proceedings.* But here the defendant had an opportunity of taking advantage of this objection by plea if it could avail him at all. And at any rate this clauſe does not relate to any defect of the memorial.

Erſkine and *Gibbs* contrà admitted that no anſwer could be given to the objection, and by

Lord KENYON Ch. J. The act certainly only meant to refer to ſuch judgments on warrants of attorney as were intended to be part of the ſecurity for the annuity, and not to extend to caſes where a judgment is obtained in the ordinary courſe of law on any inſtrument given for ſecuring the ſame.

Per Curiam, Rule diſcharged.

Wedneſday, Feb. 7th.

REID *againſt* CLARKE and another.

The hundred are not liable in an action for damages brought by the perſon injured by a mob begining to pull down his houſe &c, unleſs the riot be of ſuch a kind as to amount to felony within the ſtat. 1 *Geo.* 1. *ſt.* 2. *c.* 5.

THIS was an action on the riot act, 1 *Geo.* 1. *ſt.* 2. *c.* 5., againſt the defendants, two of the inhabitants of the hundred or ward of *Caſtle.* The declaration ſtated that divers perſons to the number of twelve or more at the pariſh of *Tynemouth*, and in the hundred or ward of *Caſtle*, did unlawfully riotouſly and tumultuouſly aſſemble to the diſturbance of the public peace, and being ſo aſſembled did unlawfully *feloniouſly* and with force demoliſh in part a certain dwelling houſe of the plaintiff, ſituate &c, *ſſ.* the wainſcoting doors partitions walls ceilings windows window frames window ſhutters &c, affixed to and part of the ſaid dwelling houſe, againſt the peace &c, and againſt the ſtatute &c.

On the trial at the laſt aſſiſes at *Northumberland* before Mr. Baron *Thomſon* it appeared that on the 6th of *March* laſt there was an illumination in all the houſes at *Tynemouth*, except two or three, in honor of the victory obtained by Lord *St. Vincent* over the *Spaniſh* fleet. That a large mob were collected in the town, who broke with ſtones &c, ſeveral windows particularly the plaintiff's, and alſo the ſtanchions of the windows, the uprights of the ſaſhes, and all the window ſhutters on the inſide; and who alſo tore up the pavement before the door of a neighbour's houſe; and that the plaintiff ſuſtained damage to the amount of 6 *l.* It was objected by the counſel for the defendants that there was no demoliſhing of part of the plaintiff's dwelling houſe, and that this was not a caſe within the meaning of the riot act: the learned Judge was of that opinion, but permitted the plaintiff to take a verdict for the 6 *l.*, with liberty to the defendants to move to enter a nonſuit in caſe this Court ſhould think the objection well founded.

Law having obtained a rule niſi for this purpoſe in the laſt term, *Chambre* and *Hullock* now ſhewed cauſe againſt it. It is clear from the evidence given at the trial that the rioters had begun to demoliſh or pull down part of the plaintiff's dwelling houſe, for it appears that they not only deſtroyed the windows but alſo the ſtanchions of the windows. The windows are part of the houſe, on which ground it is conſidered that the demolition of windows is waſte. *Co. Lit.* 53. *a*; and *Herlakenden*'s caſe, 4 *Co.* 63. *b.* Then if this were a beginning to pull down the plaintiff's houſe, the caſe is brought within the ſixth ſection of the act, on which this action is founded. It is not neceſſary now to conſider whether the rioters were guilty of a felony within the firſt ſection of the act, becauſe the clauſes are perfectly diſtinct and independent of each other. To conſtitute a felony within the firſt ſection it is neceſſary that twelve perſons ſhould be aſſembled, but it is not neceſſary that there ſhould be that number to bring a caſe either within the fourth or ſixth ſections of the act. *Pritchit* v. *Waldron*, *ante*, 5 vol. 14. The word "feloniouſly" in this declaration is impertinent, and may be rejected as ſurpluſage. Though ſome parts of this act of parliament are highly penal, yet the ſixth ſection, which gives a remedy againſt the hundred, is remedial, *Wilmot* v. *Horton*, *Dougl.* 702. *n.* (3). and conſequently it ought to receive a liberal conſtruction.

Lord Kenyon Ch. J. This is an attempt to extend this act of parliament, which is a penal law, farther than it has ever yet been carried. If the hundred are liable in this action, the rioters are guilty of felony (*a*); for I cannot agree with the plaintiff's counſel that the different ſections of this act are ſo far to be conſidered ſeparately and diſtinctly that the hundred are anſwerable for damages done by perſons who are not guilty of felony within the former part of the act. And I am moſt clearly of opinion that this was not a beginning to demoliſh or pull down the plaintiff's houſe within the meaning of the fourth ſection of the act. The rioters who committed this outrage on the plaintiff's property are deſerving of reprehenſion and puniſhment: but ſtill they are not guilty of felony; and therefore I think that the rule to enter a nonſuit muſt be made abſolute.

Per Curiam, Rule abſolute (*b*).

(*a*) Vid. *Ratcliffe* v. *Eden*, *Cowp.* 488, 9.

(*b*) There was a ſimilar caſe of *Brown* againſt theſe defendants, where the like rule was made.

Wedneſday, Feb. 7th.

GLAISTER *againſt* HEWER and others.

The petitioning creditor's debt did not amount to 100*l.* at the time of the act of bankruptcy, but was increaſed to a little more than 100*l.* by a promiſſory note of the bankrupt due at that time being indorſed to him before he petitioned for the commiſſion: this debt was deemed ſufficient to ſupport the commiſſion.

IN trover for goods taken by the defendants under a commiſſion of bankrupt iſſued againſt the plaintiff in *March* 1797, the queſtion in diſpute was, Whether the commiſſion had legally iſſued? The trading and act of bankruptcy (which was by abſconding in *January* 1795) were proved, and the only point reſerved aroſe on the legality of the petitioning creditor's debt; as to which it appeared that the plaintiff at the time of the act of bankruptcy was indebted to the defendant *Hewer* in a ſum below 100*l*, and to ſeveral other perſons in ſmaller ſums, amongſt others to one *Wilſon*, to whom the plaintiff had in 1787 given a promiſſory note for 11 *l.* 12*s.* which was ſtill outſtanding. This note was indorſed to *Hewer* by *Wilſon* for a valuable conſideration after the plaintiff had abſconded, in order to enable *Hewer* to become a petitioning creditor, the two ſums together amounting to above 100 *l.* *Rooke* J., before whom the cauſe was tried at the laſt *Carliſle* aſſizes, being of opinion that the petitioning creditor's debt was proved, directed the jury to find a verdict for the defendants; reſerving the point, ſo that if this Court ſhould be of a different opinion the plaintiff might enter up a verdict for the value of the goods.

Accordingly in the laſt term it was moved to enter the verdict for the plaintiff, on the ground that the whole of the petitioning creditor's debt muſt exiſt in him at the time of the act of bankruptcy committed; the buying up part of it afterwards for that purpoſe being a fraud upon the act of the 5 *Geo.* 2. *c.* 30.

Law and *Chambre* ſhewed cauſe againſt the rule; and contended that it was not neceſſary that the petitioning creditor (where there is but one) ſhould have an entire debt of 100*l.* at the time of the act of bankruptcy committed. It is ſufficient if the debt be outſtanding in any perſon at the time, ſo that it may be proved under the commiſſion. The 5 *Geo.* 2. *c.* 30. *ſ.* 23, for preventing the taking out commiſſions of bankrupt maliciouſly, enacts "that no commiſſion of bankrupt ſhall be "iſſued againſt any perſon upon the petition of one or more "creditors unleſs the ſingle debt of the creditor or of two "or more partners petitioning for the ſame amount to 100*l.* or "unleſs the debt of two creditors ſo petitioning amount to 150*l.*

GLAISTER *againſt* HEWER.

" or of three or more creditors to 200*l.*" The language of this clauſe evidently refers to the time of petitioning. But it has alſo been expreſsly decided in *Bingley* v. *Maddiſon* (*a*), Ex parte *Thomas* (*b*), and in 2 *Wilſ.* 135. that a note or bill due from the bankrupt at the time of the act of bankruptcy committed, and indorſed afterwards to another, will conſtitute a good petitioning creditor's debt in the holder. Then there can be no diſtinction in the caſe, whether the whole or a part be ſo aſſigned after the act of bankruptcy. It is no injury to the trader himſelf, to whom it muſt be indifferent whether one perſon or another holding the ſecurities given by him requires payment out of his eſtate. And the object of the Legiſlature, in requiring the petitioning creditor's debt to be of a certain amount, is ſufficiently anſwered; it being only to guard againſt commiſſions of bankrupt being ſued out for very trifling demands, where the expence might abſorb the whole debt, and the trader be liable to be haraſſed unneceſſarily.

Cockell Serjt. and *Park* contrà. None of the caſes cited apply, becauſe in all of them there was a ſufficient debt exiſting in ſome perſon at the time of the act of bankruptcy committed, upon which a commiſſion might be ſued out. Whereas here no commiſſion could have been taken out at the time by any creditor or number of creditors united. If then *Hewer* and *Wilſon* by joining their demands together could not have made a legal petitioning creditor's debt, it is a fraud on the bankrupt laws to do that indirectly which could not have been done directly: and ſo it was conſidered by *Buller* J. in giving his judgment in the caſe of *Bingley* v. *Maddiſon*; where he ſaid that if two creditors had each of them bills of 50*l.* on the bankrupt at the time of his bankruptcy, they could not by a ſubſequent indorſement from one to the other make a petitioning creditor's debt of 100*l.*

Lord KENYON Ch. J. All that the act of parliament requires is, that there ſhould be an exiſting debt of 100*l.* in the petitioning creditor; this petitioning creditor had ſuch a debt at the time of petitioning, and that is ſufficient to ſupport the commiſſion. I confeſs I cannot accede to what is ſuppoſed to have been ſaid by Mr. J. *Buller* in the caſe of *Bingley* v. *Maddiſon*: the act of parliament only ſays, that no commiſſion ſhall be taken out "unleſs the debt of the creditor petitioning for the ſame do amount to the ſum of 100*l.*" Then when is that debt to exiſt? at the time of the petitioning. It has been ſeveral times decided, and indeed it was admitted in this caſe, that

(*a*) *B. R. Mich.* 1783. Vid. *Cooke's Bank. L.* 13. 1ſt edit.

(*b*) 1 *Atk.* 73.

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that it is not neceſſary that the debt ſhould exiſt in the petitioning creditor at the time of the act of bankruptcy: then why ſhould we introduce nice diſtinctions that are not warranted by the act of parliament? I ſhould tremble for the conſequences of ſetting aſide this verdict; by deciding that this commiſſion cannot be ſupported, we might overſet titles derived under ſimilar commiſſions that have been acquieſced in, and under which real eſtates may have been ſold.

ASHHURST J. and GROSE J. were of the ſame opinion.

LAWRENCE J. The perſon to whom a note of the bankrupt's is indorſed after an act of bankruptcy is in the ſame ſituation as the holder of it was in before, otherwiſe in the caſe of *Bingley* v. *Maddiſon* the petitioning creditor could not have proved his debt under the commiſſion at all. And the principle on which that caſe was determined muſt govern the preſent.

Rule diſcharged.

Thurſday, Feb. 8th.

The Company of Proprietors of the LEOMINSTER CANAL NAVIGATION *againſt* THOMAS NORRIS and HAROLD.

By a canal act the Company were authoriſed to take certain lands for the purpoſes of the act, on making certain payments either by annual rents or ſums in groſs, and the perſons from whom the land was to be taken were empowered to diſtrain the goods of the Company even off the premiſes in caſe of non-payment of ſuch ſums: An avowant, ſtating a diſtreſs under this act of parliament is not entitled, on obtaining a verdict, to double coſts under the ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 22.

IN replevin for taking the goods of the plaintiffs, the defendant *Norris* avowed and the other defendant *Harold* acknowledged the taking &c as bailiff to the defendant *Norris* and to *E. Norris.* And they ſtated that the ſaid *T.* and *E. Norris* before the paſſing of a certain act after mentioned were ſeiſed in fee of two acres of land with the appurtenances, and were alſo ſeiſed in fee according to the cuſtom of the manor of *Orleton* of two other acres of land with the appurtenances in *Orleton.* That by an act, 31 *Geo.* 3., for making and maintaining a navigable canal through *Leominſter* &c, the company of proprietors were authoriſed to make a canal navigable for boats to *Kingſton* through ſeveral pariſhes therein mentioned; and were empowered to enter on the lands of any perſon to make a ſurvey &c, and to ſet out ſuch parts as they ſhould think neceſſary for making the canal &c, they making ſatisfaction in the manner therein mentioned for all damages to be ſuſtained by the owners and perſons intereſted in ſuch lands as ſhould be taken uſed or prejudiced in or by

the

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the execution of the act. That certain perſons were thereby appointed commiſſioners to determine all queſtions that ſhould ariſe between the Company and the perſons intereſted in any lands that ſhould be affected or prejudiced by the execution of the act; and alſo to determine from time to time what ſum of money ſhould be paid by the Company either by annual rent or by a ſum of money in groſs for the abſolute purchaſe of the houſes lands &c, which ſhould be ſet out and aſcertained or intended to be taken or made uſe of for making the ſaid canal; and alſo to determine what other diſtinct ſum of money ſhould be paid by the Company as a recompence for any damages which ſhould be ſuſtained by ſuch perſon intereſted &c, by reaſon of making repairing or maintaining the ſaid canal &c, in caſe ſuch price or value of damages and recompence reſpectively could not be ſettled and agreed for by and between the ſaid Company and the perſons intereſted &c. That it was by the ſaid act enacted that ſuch annual rents or ſums as ſhould be ſo agreed upon or ſettled and aſcertained ſhould be charged on the rates therein granted to the Company, and ſhould be paid by them as the ſame ſhould become due, and in caſe ſuch annual rents or ſums ſhould not be paid within twenty-one days after they ſhould become due, ſuch perſons were thereby empowered to ſeize and diſtrain any boats or other effects of the Company which ſhould be found on the canal or on the wharfs warehouſes or other works thereto belonging, and to detain the ſame until payment &c. The defendants then ſtated that the Company in the execution of the powers given to them by the act entered into divers lands of the ſaid *T.* and *E. Norris* (ſpecifying them,) and ſet out and aſcertained the firſt of them containing four acres, and divers parts of the ſaid other lands (ſpecifying them) for the making improving and completing of the ſaid canal &c, and took and made uſe of the ſame for the purpoſes aforeſaid. That the *annual rent or ſum* to be paid to the ſaid *T.* and *E. Norris* by the ſaid Company for the ſaid lands was in due manner ſettled and determined by and between them and the Company according to the meaning of the act &c, and upon that adjuſtment ſo made it was on the 28th of *Nov.* 1791 agreed by and between them and the Company that the Company ſhould pay to them for the ſame, *until the ſaid Company ſhould be poſſeſſed of the ſame by purchaſe, the annual rent or ſum of* 2*l.* 10*s.* for every acre &c; and then they ſhewed that three years of the ſaid annual rents and payments amounting to 58*l.* 2*s.* 6*d.* were due on the 2d of *Feb.* 1796 for the ſaid lands,

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lands, the ſame lands not having been purchaſed by the Company of the ſaid *T.* and *E. Norris;* and the ſaid rents being unpaid for twenty-one days afterwards the defendants took the ſaid goods of the plaintiffs as a diſtreſs &c.

There were ſeven other avowries, varying in ſome reſpects from the firſt, but in all of them it was alleged that the money was due from the Company to *T.* and *E. Norris* as annual rents.

To the firſt avowry the plaintiffs pleaded in bar, 1ſt, That the defendants of their own wrong took the ſaid goods &c, traverſing that the Company entered into the ſaid lands of the ſaid *E.* and *T. Norris* and took and made uſe of the ſame for the purpoſes in the ſaid avowry and cognizance mentioned &c; and 2dly, That the defendants of their own wrong took the ſaid goods &c, traverſing that the annual rent or ſum to be paid to the ſaid *E.* and *T. Norris* by the Company for the ſaid lands ſet out and aſcertained and taken by the Company was ſettled and adjuſted by and between the Company and the ſaid *T.* and *E. Norris*, and upon that determination and adjuſtment it was agreed between the ſaid Company and the ſaid *T.* and *E. Norris* in manner above alleged &c. Nearly ſimilar pleas in bar were pleaded to the other avowries; and iſſue was taken upon each of them.

On the trial at the laſt *Hereford* aſſiſes a verdict was given for the defendants; and in the laſt *Michaelmas* Term the plaintiffs obtained a rule calling on the defendants to ſhew cauſe why judgment ſhould not be entered for them notwithſtanding the verdict for the defendants, on account of the inſufficiency of the avowries. The objection was that the diſtreſs could not be ſupported as a diſtreſs at common law, becauſe the goods were diſtrained off the premiſes; nor as a diſtreſs under this act of parliament, becauſe the act only gave power to diſtrain for an annual rent or ſum of money in groſs *for the abſolute purchaſe of the lands* &c.: whereas it appeared here that this was not an annual rent or a ſum for the abſolute purchaſe, but merely an annual ſum *until the Company ſhould purchaſe the lands.*

Plumer and *Leyceſter* in the laſt term ſhewed cauſe againſt that rule, and

Williams Serjt. *Manley*, and *Walton*, argued in ſupport of it. But

The Court, being of opinion that the act of parliament gave a power of diſtreſs in ſuch a caſe as the preſent, diſcharged the rule.

The Maſter having ſince allowed the defendants double coſts, *Manley* moved on a former day in this term that he might review his taxation, contending that the defendants were not entitled to double coſts under the ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 22 (*a*). And he mentioned the caſe of *Lloyd* v. *Winton* (*b*), where it was holden that that act did not extend to a ſeizure for heriot cuſtom.

Leyceſter on another day ſhewed cauſe againſt that rule. This caſe is not provided for by one of the ſections (*c*) in this canal act that gives coſts in an action of debt brought for non-payment of any annual rent; for the words "with coſts of ſuit" only apply to what precedes them in the clauſe, namely, "an action of debt," and do not extend to the power of diſtreſs which is given by a ſubſequent clauſe in the act. But this ſection giving a power of diſtreſs for non-payment of annual rents, and the diſtreſs in the preſent caſe being a diſtreſs for the non-payment of ſuch a rent, the defendants who ſucceeded on the trial are entitled to double coſts under the ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 22. That clauſe begins with reciting the difficulties in making an avowry upon a diſtreſs for *rent* &c.: now that is a general term applicable to rents of every denomination; and the tenth ſection ſhews that the Legiſlature uſed it in that ſenſe, for that clauſe, authoriſing a ſale of the diſtreſs, ſpeaks of a diſtreſs "for any kind of rent." This caſe comes alſo within the enacting part of the 22d ſection, which ſpeaks of "tenants of the land enjoying the ſame under a grant or demiſe at a rent certain;" for it appears on the record

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(*a*) After reciting that great difficulties ariſe in making avowries or cognizance upon diſtreſſes for rent, quit-rents, reliefs, heriots, and other ſervices, it is enacted by this ſection that "it ſhall be lawful for all defendants in replevin to avow or make cognizance generally that the plaintiff in replevin or other tenant of the lands and tenements whereon ſuch diſtreſs was made enjoyed the ſame under a grant or demiſe at ſuch a certain rent during the time wherein the rent diſtrained for incurred, which rent was then and ſtill remains due" &c; and if the plaintiff in ſuch action ſhall become nonſuit, diſcontinue his action, or have judgment againſt him, the defendant in ſuch replevin ſhall recover double coſts of ſuit.

(*b*) 2 *Wilſ.* 28; and *Say. on Coſts* 107.

(*c*) Which enacts that ſuch annual rents or ſums as ſhall be agreed upon or ſettled and aſcertained ſhall be charged on the rates therein granted to the Company; and in caſe any ſuch annual rents or ſums ſhall not be paid within twenty-one days next after the ſame ſhall become due, "ſuch perſon to whom ſuch annual rents or ſums ſhall be due may ſue for and recover the ſame *with coſts of ſuit* by action of debt, or otherwiſe it ſhall be lawful for ſuch perſon to ſeize and diſtrain any boats veſſels or other effects of the ſaid Company which ſhall be found on the ſaid canal or in upon or about the wharfs quays warehouſes or other works belonging thereto, and to detain the ſame until payment thereof together with the reaſonable charges attending ſuch diſtreſs;" with power to ſell if the diſtreſs be not redeemed in five days as in caſes of diſtreſs for rent.

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Leominster Canal Company *againſt* Norris.

that the Company had not purchaſed this land, but that they held it under a certain annual rent until the Company ſhould purchaſe it. The caſe of *Lloyd* v. *Winton* is clearly diſtinguiſhable from the preſent; that was not the caſe of a *diſtreſs* of any kind, but only a *ſeizure* for heriot cuſtom.

Manley in ſupport of the rule. The act of parliament under which the diſtreſs was made has expreſsly given the party diſtraining ſingle coſts only; for the ſection referred to is not divided into two diſtinct parts, but it enables the perſon to whom any rent is due either to ſue by action of debt or to diſtrain for it; and the words "with coſts of ſuit" apply to the inſtance of a diſtreſs as well as to the action of debt. Nor are the defendants entitled to double coſts under the ſtat. 11 *Geo.* 2. which applies only to diſtreſſes at common law: whereas this is a diſtreſs under a particular act of parliament that allows a diſtreſs off the premiſes. This caſe is neither within the words or the ſpirit of the ſtat. 11 *Geo.* 2. That only extends to caſes between landlord and tenant, where the landlord has a reverſion expectant on the determination of the tenancy, and where the defendant avows or makes cognizance generally without ſetting forth a title: but here no tenure is ſtated, there is no reverſion in the landlords, for as ſoon as they can purchaſe the land they will purchaſe it, and this is a ſpecial avowry ſetting forth the whole title on the record under the canal act. There might be great reaſon in allowing double coſts in caſes where the avowry is general, and conſequently the record ſhort; but it would be unreaſonable, and what the Legiſlature never intended, to allow double coſts where the record is neceſſarily ſo much lengthened by the avowants' ſetting forth their whole title.

The Court, after obſerving that the caſe of *Lloyd* v. *Winton* was not the caſe of a diſtreſs, and therefore not within the ſtat. 11 *Geo.* 2., ſaid they would conſider of their opinion in this caſe. And on this day

Lord Kenyon Ch. J. ſaid, We have conſidered this caſe, and are of opinion that it is not a caſe within the ſtat. 11 *Geo.* 2. *c.* 19.; and conſequently that the defendants are not entitled to double coſts.

Per Curiam, Rule abſolute.

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Friday, Feb. 9th.

Phyn and others *againſt* The Royal Exchange Assurance Company.

A deviation of a veſſel from the voyage inſured through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not conſtitute an act of barratry.

This was an action on a policy of inſurance on goods from *London* to *Jamaica*. The declaration contained two counts; one alleging the loſs to have been by capture, the other by barratry. It appeared in evidence at the trial, before Lord *Kenyon* at *Guildhall*, that the ſhip on board which the goods were laden ſailed on her voyage from *London* for *Jamaica;* and that the captain's inſtructions from his owners were to proceed immediately to that iſland. But after the veſſel had cleared the channel ſhe was carried by ſtrong currents and from other circumſtances out of her reckoning, until at length ſhe was found to be between the *Grand Canary* and the iſland of *Teneriffe*. In this ſituation it was admitted that the direct courſe to *Jamaica* was to the ſouth-weſt; inſtead of which the captain bore up for the iſland of *Santa Cruz*, which lies to the north-weſt in ſight about thirty miles, where the veſſel came to an anchor. There an embargo was laid upon her by the *Spaniſh* government, and ſoon after the news arriving of war having been declared between *Spain* and *Great Britain* the veſſel and cargo were afterwards condemned as prize. On the part of the plaintiffs it was contended that they were neceſſarily entitled to recover on one or other of the counts in the declaration; on the firſt if there were no deviation; or admitting that the ſhip's going to *Santa Cruz* inſtead of purſuing a ſouth-weſterly courſe to *Jamaica*, after the captain knew with certainty where the ſhip was, was a deviation, ſo as to preclude the plaintiffs from recovering upon the firſt count as for a loſs by capture, ſtill that ſuch a wilful deviation by the captain againſt the directions of his owners, without any conſideration of advantage to them, and merely for the ſake of procuring a temporary refreſhment for himſelf and his company, was an act of barratry upon which the plaintiffs were entitled to recover on the ſecond count. Lord *Kenyon* thought that it could not be barratry without a fraudulent purpoſe in the captain at the time; and he left the queſtions to the jury with that direction, who found that the captain's going to *Santa Cruz* "was a deviation, and was owing "either to ignorance or ſomething elſe, *but that it was not* "*fraudulent*;" and they accordingly found a verdict for the defendants.

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Phyn *againſt* **The Royal Exchange** Aſſurance Company.

A rule having been obtained calling on the defendants to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had,

Erſkine and *Park* now ſhewed cauſe againſt it. This is an attempt to convert a ſimple deviation into barratry, but they are entirely diſtinct in their nature, and ought not to be confounded. The former means a voluntary departure without neceſſity or reaſonable cauſe from the courſe of the ſpecific voyage inſured: whereas the latter ſignifies an act of the maſter or mariners of a criminal nature in itſelf, or at leaſt groſsly negligent, tending to their own benefit, to the prejudice of the owners of the ſhip, without their privity or conſent (*a*). The term barratry imports fraud (*b*). It muſt be ſomething of a criminal nature againſt the owner of the ſhip by the maſter or mariners (*c*). This doctrine was not meant to be impeached by the Court in *Moſs* v. *Byrom* (*d*): but the expreſſions which fell from ſome of the judges there are to be taken with reference to the caſe then in judgment; and there could not be a ſtronger inſtance of criminality in the conduct of the captain than in that caſe, where he not only cruiſed for prize againſt the expreſs direction of his owners, but was guilty of an act of piracy in plundering a neutral veſſel.

Gibbs, *Adam*, and *Giles*, contrà. The act of the captain in going into *Santa Cruz* from the place where he firſt recovered his reckoning was a wilful act, which he muſt have known was prejudicial to his owners, ſince it would forfeit their inſurance. And though he might not have had any idea of pecuniary advantage to himſelf in ſo doing, yet as the act was intended for his own accommodation (as probably to get refreſhment), and was in it's nature prejudicial to his owners and contrary to the duty he owed to them, it is ſufficient to conſtitute barratry. It was ſo conſidered by the Court in giving their judgment in *Moſs* v. *Byrom* (*d*). The idea of pecuniary benefit to the captain or mariners in prejudice to their owners is not eſſential to barratry. It was ſaid by *Buller* J. in *Saloucci* v. *Johnſon* (*e*) that if the act of the captain in reſiſting the ſearch of his ſhip by a *Spaniſh* veſſel at ſea had been a forfeiture of his neutrality, it would have been barratry; which, he ſaid, meant a wilful act of the captain to the

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(*a*) Vid. *Park. on Inſur.* 94. 1ſt ed.

(*b*) *Knight* v. *Cambridge*, 2 *Ld. Raym.* 1349.

(*c*) *Stamma* v. *Brown*, 2 *Str.* 1173. and *Nutt* v. *Bourdieu*, *ante*, 1 vol. 323.

(*d*) *Ante*, 6 vol. 379.

(*e*) *B. R. Trin.* 25 *Geo.* 3. *Park. on Inſur.* 415.

injury

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Phyn *againſt* The Royal Exchange Aſſurance Company.

injury of his owners; yet in that caſe the captain could not have had any benefit to himſelf in contemplation. Criminality in the ſenſe uſed in the books on this ſubject means only criminal in reſpect of the duty which the captain owes to his owners; in which ſenſe any wilful act in diſobedience to their orders or manifeſtly to their prejudice is an act of criminality. Now here the act was directly prejudicial to them, and in contravention of their expreſs orders. The only implied obligation on the part of the owners is, to appoint a captain of competent ſkill to direct the veſſel. The under-writer engages againſt all his wilful acts to the prejudice of the owners. But on the other hand if the verdict of the jury implies that the captain went to *Santa Cruz* by miſtake, conſidering that to be in his courſe, then there is no deviation in point of law, and the plaintiffs will be entitled to recover on the firſt count.

Lord Kenyon Ch. J. As ſo many obſervations have been made in the argument of this caſe on the different expreſſions uſed by the ſeveral judges in the caſes cited, I will take care not to hazard an extrajudicial opinion now. I will therefore only ſay that, as it ſeems admitted that there muſt be fraud to conſtitute barratry, and as the jury have expreſsly ſaid that there was no fraud in this caſe, I am of opinion that there was no barratry, and conſequently that there ought not to be a new trial.

Ashhurst, J. I think that we are bound by the verdict of the jury, who have negatived barratry by ſaying there was no fraud in the caſe.

Grose J. The queſtion is, Whether this were a barratrous deviation? Now in order to ſee whether this were or were not barratry, I will refer to the opinion of a very able lawyer, Mr. J. *Aſton*, who in the caſe of *Valejo* v. *Wheeler* (*a*) ſaid that there muſt be fraud or knavery to conſtitute barratry; "Barratry is not confined to the running away with the ſhip, but *comprehends every ſpecies of fraud*, *knavery*, *or criminal conduct in the maſter*, by which the owners or freighters are injured." An opinion of Mr. J. *Buller* in *Saloucci* v. *Johnſon* has however been cited to ſhew that he thought that fraud was not neceſſary to conſtitute barratry: but that is not fairly to be collected from what fell from that judge in that caſe, where it was not neceſſary to give a definition of barratry; and in a ſubſequent caſe, *Roſs* v. *Hunter* (*b*), where his attention was more immediately called to this ſubject, he conſidered that barratry

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(*a*) *Cowp.* 155, 6. (*b*) *Ante*, 4 vol. 37.

could

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Phyn *againſt* The Royal Exchange Aſſurance Company.

could not exiſt without fraud; "In one ſenſe of the word it is a deviation by the captain *for fraudulent purpoſes of his own*; and that is the diſtinction between deviation, as it is generally uſed, and barratry." Therefore Mr. J. *Buller* agreed with Mr. J. *Aſton* in thinking that fraud is a neceſſary ingredient in barratry. Then it was argued that this is a verdict againſt evidence, becauſe the jury have found that there was no fraud: but I ſhould doubt my own opinion on a queſtion of fact when put in oppoſition to that formed by perſons who are more converſant than I am in tranſactions of this kind, unleſs it manifeſtly appeared by the evidence that there had been ſome miſtake. The plaintiffs' counſel do not ſay that the captain did any thing fraudulently for purpoſes of his own againſt the intereſt of his owners: and it is enough for me to ſay that I do not ſee that any fraud was committed, that we cannot preſume fraud, and that the jury have negatived fraud.

Lawrence J. Some ſtreſs has been laid on an expreſſion of mine in *Moſs* v. *Byrom*, where it is ſuppoſed I gave an opinion that fraud was not a neceſſary ingredient in barratry, in ſaying "*Whatever was done* by the captain to defeat or delay the performance of the voyage was barratry in him, it being to the prejudice of his owners:" but what fell from me there muſt be taken with a reference to the caſe then in judgment before the Court, where there were ſtrong circumſtances to ſhew a criminal intention in the captain; and the words ſaid to have been uſed by me muſt be underſtood thus, "*Thoſe things that were done by the captain in that caſe* to defeat or delay the voyage conſtituted barratry" &c. There is no caſe that I know of in which it was ſaid that the act of the captain is barratry merely becauſe it is againſt the intereſt of the owners, unleſs it be done with a criminal intent. In the caſe of *Stamma* v. *Brown*, of which I have a manuſcript note, *Lee* Ch. J., in defining barratry, ſaid "Barratry muſt be ſome breach of truſt in the maſter, ex maleficio." In this caſe the jury, having negatived fraud, have in my opinion negatived criminality in the captain; and therefore this was not a barratrous deviation.

Rule diſcharged.

Fowler *againſt* Padget.

Thurſday, Feb. 8th.

In order to conſtitute an act of bankruptcy by a trader in departing from his dwelling houſe, it is not alone ſufficient that a creditor ſhould be thereby delayed, but the departure muſt alſo have been with that intent. The word "*or*" in the ſtatute of the 1 *Jac.* 1. *c.* 15. muſt be read "*and.*"

Trespass for breaking and entering the plaintiff's dwelling houſe at *Mancheſter*, and taking and converting his goods. The defendant juſtified under the bankrupt laws, and the only queſtion was, Whether the plaintiff had committed an act of bankruptcy. At the trial before *Rooke* J. at the laſt *Lancaſter* aſſizes, it appeared that the plaintiff, who was a trader at *Mancheſter*, having received intelligence that one *Smith* in *London* who was indebted to him to a large amount was in a failing condition, left his houſe early on the 17th *April* and went to *London* for the purpoſe of arranging his affairs with *Smith*, and getting ſecurity for his demand. That having received of *Smith* goods of a conſiderable value and a bill of exchange for 129*l.* he returned to *Mancheſter* after an abſence of ten days; during which time ſeveral creditors called at his houſe at *Mancheſter* for payment of their reſpective debts, which were not ſatisfied, the bankrupt not having made any proviſion for them, nor left any perſon in charge to conduct his buſineſs during his abſence. Amongſt theſe creditors were the holders of ſeveral bills which became due on the day after his departure, and whom he expected to call on him for payment. After his return to *Mancheſter* ſome of his creditors compounded with him and received 10*s.* in the pound: but a commiſſion of bankrupt was taken out againſt him by the defendant and his partner. The jury found a verdict for the plaintiff for 27*l.*, declaring in anſwer to a queſtion put to them by the learned judge, "that they thought the intent of the plaintiff "in going to *London* was laudable; that he had no intent to "defraud or delay his creditors; but that delay did actually "happen to ſome creditors."

A rule was obtained in the laſt term calling on the plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had; againſt which

Law, *Topping*, and *Bayley*, ſhewed cauſe. They obſerved that this was a caſe where the trader had left his houſe not with a view to elude or defraud his creditors, but for the purpoſe of uſing diligence to ſecure his property which was in hazard, by which, though ſome creditors were in fact delayed for a ſhort time, yet ultimately his eſtate was benefited, and their ſecurity was bettered. And they contended that if this were to be conſtrued an act of bankruptcy, it would entirely reverſe the intent of the act of the 1 *Jac.* 1. *c.* 15. which ought to be regarded in conſtruing the words, otherwiſe the maxim applies qui hæret in literâ hæret in cortice. The *departing from the dwelling houſe* was firſt made an act of bankruptcy by the 13 *Eliz. c.* 7.; but by the expreſs words of that act it muſt have been done "to the intent or purpoſe to defraud or hinder any of the creditors of their juſt debts" &c. The 1 *Jac.* 1. *c.* 15. after repeating the ſeveral acts of bankruptcy declared by the former ſtatute, adds others, which are all premeditated frauds, and then concludes "to the intent *or* "*whereby* his creditors may be defeated or delayed" &c. Now this variation in the wording was evidently intended to apply to the new acts of bankruptcy which had been introduced by the ſtatute of *James*, all of which are founded in intentional fraud, where the very nature of the act implies a fraudulent intent: whereas all the acts of bankruptcy mentioned in the former ſtatute, amongſt others this of departing from the dwelling houſe, are in themſelves indifferent acts, and only become criminal when done with an intent to delay or defraud creditors. In order therefore to make the act of *James* conſiſtent with that of *Elizabeth*, and with the nature and ſpirit of the bankrupt laws in general, it is neceſſary to read the word "*or*" in the ſtatute of *James* "*and*"; whereby both the intent to defeat or delay and the actual defeat or delay of the creditor muſt concur to conſtitute an act of bankruptcy. Though ſuch intent may be collected as well from the nature of the act done as from collateral evidence, the neceſſity of ſuch an intent to conſtitute an act of bankruptcy is apparent from the conſideration that at the time when theſe ſtatutes paſſed bankruptcy was conſidered as a crime, which can in no caſe exiſt without a criminal intent; actus non facit reum niſi mens ſit rea. It is to be collected alſo from the preamble of the ſtatute of *James*, which ſays, "*for that frauds and deceits, as new diſeaſes*, daily "increaſe among ſuch as live by buying and ſelling to the "hindrance of traffic and mutual commerce and to the general "hurt of the realm, by ſuch as wickedly *and wilfully become* "*bankrupts*, and for that the deſcription of a bankrupt in former "ſtatutes is not ſo fully expreſſed &c, as is meet *in ſuch caſes* "*of deceit* to prevent the *deceitful actions* of bankrupts, for "remedy" &c. The caſe of *Hawkes* v. *Saunders* (*a*) is alſo conſonant to this interpretation; where it was holden that an order, by a trader who kept houſe, to his ſervant to deny him to

(*a*) *Tr.* 24 *Geo.* 3. *B. R.* Vid. *Cooke's Bank. L.* 72.

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creditors was not ſufficient to conſtitute an act of bankruptcy, unleſs a creditor was actually denied. Now if the keeping houſe with intent to delay creditors, which was manifeſt in that caſe, was not deemed an act of bankruptcy, unleſs a creditor were in fact delayed (*a*), there is no reaſon why the fact of actual delay ſhould conſtitute an act of bankruptcy without a correſponding intent. That caſe therefore cannot be ſupported unleſs the word *or* be conſtrued *and*. The contrary is indeed ſaid to have been decided in *Woodier*'s caſe (*b*), where his going abroad on account of having killed his wife, whereby his creditors were in fact delayed, was holden to be an act of bankruptcy. But if that caſe be fairly conſidered, it does not neceſſarily go this length. Where a man goes abroad on account of ſome criminal act which muſt neceſſarily occaſion his abſence for a long time at leaſt, if not during his life, and he makes no proviſion in a reaſonable time for the payment of his creditors or the carrying on of his buſineſs, although he might not have gone in the firſt inſtance with the expreſs view of delaying his creditors, yet ſuch an intent is neceſſarily to be inferred from his ſubſequent acts: he puts himſelf in a ſituation which makes it impoſſible for him to carry on his buſineſs any longer. The ſame obſervation is applicable to *Poreau*'s caſe (*c*), who went abroad with a young woman whom he had ſeduced. If the doctrine of thoſe caſes be carried to the extent contended for on the other ſide, as eſtabliſhing the rule of conſtruction to be that the mere fact of departing from the dwelling houſe, if a creditor be thereby actually delayed, conſtitutes an act of bankruptcy, although he had no ſuch intent, the greateſt inconvenience and miſchief will enſue. For then the moſt ſolvent and reſponſible trader may be made a bankrupt if he chance to go out on buſineſs or amuſement, and a creditor call in the mean time who is thereby in fact delayed. And it is no anſwer to ſay that he may leave a clerk to tranſact his buſineſs and pay all demands upon him; for ſuppoſing every trader to have ſo confidential a ſervant, which cannot be expected, ſtill he would be at his mercy; for the ſame conſequence would enſue if the clerk were out of the way at the time; and this might equally happen though the trader had gone out with the expreſs view of finding and ſatisfying his creditors. They alſo cited a

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(*a*) See alſo *Garret* v. *Moule*, *ante*, 5 vol. 575.

(*b*) *Bull. N. P.* 39.

(*c*) *Raikes* v. *Poreau*, *Co. Bank. L.* 73. 4th Ed.

caſe

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caſe of *Aldridge* v. *Ireland*, *E.* 34 *G.* 3. where on a motion for a new trial, it appeared that an execution being put into the houſe of a Mrs. *Wall* a linen-draper at *Bath* by her brother who lived in *London*, ſhe immediately went to *London* in order to prevail on him to withdraw it, leaving word where ſhe was gone: but her brother inſiſting on the execution, which was ſufficient to cover all her effects, ſhe never returned to *Bath*; the queſtion was, Whether her leaving *Bath* was an act of bankruptcy; the Court, (Lord *Mansfield*, Mr. J. *Willes*, Mr. J. *Aſhhurſt*, and Mr. J. *Buller*,) ſaid that it depended on the intention of Mrs. *Wall*, when ſhe left her houſe at *Bath*, whether or not ſhe had committed an act of bankruptcy, whether ſhe went with the intention of delaying or defeating her creditors.

Chambre and *Holroyd*, in ſupport of the rule, contended that both on the poſitive words of the ſtatute of *James*, and on the conſtruction which had always prevailed on this branch of it, the facts here proved muſt be taken to be an act of bankruptcy. The plaintiff when he left *Mancheſter* for *London* ſhut up his warehouſe, left no perſon to tranſact his buſineſs, and never in fact carried it on afterwards. Therefore though, as the jury have found that his intent in going to *London* might not have been to delay his creditors, yet he could not but have known that they muſt have been delayed, and in fact they were ſo. The inconvenience to the creditors under ſuch circumſtances is exactly the ſame, whatever be the intent of the bankrupt in departing from his houſe: and when it is conſidered that the primary object of the bankrupt laws is to make as juſt and as ſpeedy a diviſion as poſſible of the inſolvent trader's effects amongſt his creditors, there will appear to be a very ſubſtantial reaſon for the difference of the wording in the ſtatute of *James* and that of *Elizabeth*; which very difference furniſhes a ſtrong argument that ſomething more was intended in the ſtatute of *James* than had been expreſſed in the former one. But however that may be, the words of the ſtatute of *James* are poſitive, that wherever a trader ſhall depart from his dwelling houſe to the intent *or whereby* his creditors ſhall be delayed, it is an act of bankruptcy. It might be difficult in many caſes to prove the intent with which a man leaves his houſe; to obviate which the Legiſlature had recourſe to the more poſitive and certain evidence of the creditor having been in fact delayed to conſtitute the act of bankruptcy. And ſuch has always been the conſtruction put upon this branch of the act, in the caſe of *Woodier*, ſince followed up by that of *Raikes* v. *Poreau*, and *Vernon* v. *Hankey* (*a*). In the latter, one of the queſtions was, Whether Mrs. *Tyler*'s going abroad without any intention to delay her creditors, but whereby they were in fact delayed, was an act of bankruptcy? and *Buller* J. ſaid "the law upon this ſubject is eſtabliſhed by *Woodier*'s caſe, which happened in 1739, and which has always been conſidered and acted upon as good law; and at this time without examining into the expedience of that deciſion, I ſhould be extremely averſe to overrule it." Many commiſſions of bankrupt and a conſiderable maſs of property depend on this conſtruction. It is ſaid however that this conſtruction will be attended with inconveniences; but the inconveniences are much greater the other way. Thoſe on the trader are ſuch as he may eaſily avoid by making due preparation for the ſatisfaction of all demands to which he knows he is liable, or at leaſt by leaving word, when he removes from his houſe, where he is going, in order that the proceſs of the law may follow him; for as to his merely walking out of his doors upon his neceſſary buſineſs or ordinary occaſions that cannot be nor ever was conſidered as *a departing* from his dwelling houſe. Such an act is explained by his return and carrying on his buſineſs as uſual. So *keeping* houſe means keeping it as againſt creditors; and therefore the fact of a creditor being denied is a neceſſary ingredient to conſtitute an act of bankruptcy within that deſcription in the ſtatute. There is alſo another reaſon to ſhew that this conſtruction is the more convenient one, becauſe the creditor can ſcarcely ever know with what intent a man goes away from his houſe; but the fact of his being delayed payment thereby is notorious and eaſy to be ſubſtantiated; and a principal object of the ſtatute of *James* was to reduce to as great a certainty as poſſible what ſhould be deemed acts of bankruptcy.

Lord Kenyon Ch. J. This is a queſtion of infinite importance, and therefore I wiſhed that the parties would have conſented (*b*) to put it on the record, in order that it might be finally decided by the court of dernier reſort. If there had been no deciſion

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(*a*) *London* Sittings after *Trin.* 27 *Geo.* 3. *Co. Bank. L.* 95.

(*b*) In the courſe of the argument the Court expreſſed a wiſh that the parties would conſent to ſtate the facts of the caſe on a ſpecial verdict; but this was not agreed to on account of the ſmallneſs of the ſum in diſpute, and the ſituation of the plaintiff.

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Fowler *againſt* Padget.

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ciſion on this ſubject, I ſhould have thought very little doubt could have been entertained on the conſtruction of the act of parliament. Bankruptcy is conſidered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural juſtice, and of our law, that actus non facit reum niſi mens ſit rea. The intent and the act muſt both concur to conſtitute the crime; and by reading the word "and" for "or" in the ſtatute of 1 *Jac.* 1. *c.* 15., which is frequently done in the conſtruction of legal inſtruments where the ſenſe requires it, all difficulty will be removed. But according to the defendant's conſtruction of this act, every merchant in *London* might become a bankrupt before to-morrow morning. If the words of the ſtatute are to be taken in their literal ſenſe, any perſon who happens to go from home only for an hour, during which time any creditor calls for payment, and is for that hour delayed, may become a bankrupt: and it would be no anſwer to ſuch an argument (as was ſuppoſed at the bar) to ſay that the trader left word where he was gone, becauſe a creditor may have taken out a writ againſt him in one county, and if he were gone on the borders of the next county, ſuch creditor would in fact be delayed. I do not wiſh to impeach the authority of *Woodier*'s caſe or of that of *Raikes* v. *Poreau*, becauſe in both the parties went abroad under circumſtances that rendered it highly probable that they would not return to this country; one had committed murder, and the other was ameſnable to the laws of his country for a different offence. We have been preſſed however with another caſe, that of *Vernon* v. *Hankey*, tried before Mr. J. *Buller:* I have the greateſt reſpect and reverence for the opinions of that learned Judge, but I rather think we have another opinion of his (*a*) to ſet againſt that delivered by him in *Vernon* v. *Hankey*, where he ſaid that the intention with which the party left his houſe was to decide the queſtion, and I think that was the better opinion. The Legiſlature never could have meant to extend criminality to a perſon who leaves his houſe only for the purpoſe of tranſacting his legal concerns. I would adopt any conſtruction of the ſtatute that the words will bear in order to avoid ſuch monſtrous conſequences as would manifeſtly enſue from the conſtruction contended for by the defendant. And as this verdict was taken

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(*a*) In *Aldridge* v. *Ireland*, *ſup.* which Mr. J. *Lawrence* read from his note-book in the courſe of the argument.

on the ground that the plaintiff had not committed an act of bankruptcy, I am not prepared to ſay that there ought to be a new trial.

Ashhurst J. As different opinions have been entertained in the different caſes on this ſubject, I think we ought to adopt that conſtruction which will be attended with the leaſt inconvenience. The rule of conſtruction contended for by the defendant is a moſt ſevere one: if that were to obtain, any trader who left his houſe with the intention of benefiting his creditors might become a bankrupt, if any one of his creditors were thereby delayed even for an hour; that rule might affect the richeſt man in the kingdom. But if the word "or" in the act be conſtrued to mean "and," then the rule will be a reaſonable one. And this conſtruction ſeems conſonant to the deciſions on another part of this ſtatute; for if a trader begin to keep houſe and give orders to be denied to his creditors, it has been decided that that is not an act of bankruptcy, unleſs in point of fact he be denied to a creditor. This ſhews that the intent and the act muſt concur in order to conſtitute an act of bankruptcy.

Grose J. In deciding this caſe we ought to conſider the ſpirit as well as the letter of the act of parliament on which this queſtion ariſes. The Legiſlature in framing it ſeem to have had in view thoſe perſons who did certain acts which ſhewed that they knew their creditors would be defeated or delayed, and thoſe who avoided their creditors either by keeping houſe or leaving their home with intent to delay the creditors. And this conſtruction of the act is not impeached either by *Woodier*'s caſe or by that of *Raikes* v. *Poreau*, for there the parties muſt have known that their creditors would neceſſarily be delayed by the ſteps they took. But in this caſe ſo far from the plaintiff's having any intention to delay his creditors, the jury expreſsly found that he had no ſuch intention, nay that his intention was laudable, for it appeared that he went from home for the purpoſe of obtaining money to prevent his creditors being delayed. To ſay that this was an act of bankruptcy, merely becauſe ſome of the plaintiff's creditors were unintentionally delayed by an act intended for their benefit, would be a moſt ſevere determination, eſpecially in a caſe where we are called upon to grant a new trial againſt the juſtice of the caſe. I do not mean to ſay that this is not a point of ſome difficulty, and certainly it is a queſtion of great conſequence: but as theſe parties are not equal to the expence of a ſpecial verdict, I

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am not diſpoſed to grant a new trial, particularly when we conſider that the queſtion will probably come back again here in the ſame ſhape, on a motion for a new trial.

Lawrence J. If there had been no deciſion on this act of parliament, I ſhould have thought that the true way of conſtruing it would be to read "and" for the word "or," and then all difficulty would have been avoided. But as ſome of the caſes ſeem to have proceeded on the ground that the ſtatute muſt be read in the alternative, and that a trader may become a bankrupt by doing the acts there enumerated, if in point of fact his creditors be thereby delayed whatever may have been his intention, it ſeems to me that this queſtion deſerves great conſideration. I think that *Woodier*'s caſe and the caſe of *Raikes* v. *Poreau* might have received the ſame determination, though on a different ground; for though it was not the immediate object of the parties in thoſe caſes to delay their creditors by going abroad, yet as that muſt be the neceſſary conſequence of ſuch an act, it would be evidence of their intending to delay or defeat their creditors, and ſo it would come within the conſtruction of the ſtatute now contended for by the plaintiff. However thoſe caſes ſeem to have been determined on the ground that the fact of delay in conſequence of going abroad was ſufficient to conſtitute an act of bankruptcy; and therefore I wiſhed that the queſtion might be put on the record. But it would anſwer no purpoſe to grant a new trial in this caſe, becauſe as the parties will not conſent to have a ſpecial verdict probably the caſe will come to us again (as my Brother *Groſe* has obſerved) in the ſame form.

Rule diſcharged (*a*).

On the next day Lord *Kenyon* Ch. J. ſaid that he had met with ſeveral authorities in ſupport of the opinion he had given in this caſe. In *Maylin* v. *Eyloe*, 2 *Str.* 809., it ſeems to have been taken for granted that the word "or" in the ſtatute meant "and," for the words of the ſtatute are thus printed, "departing from his houſe with intent *and* whereby his creditors may be defeated" &c, and they are printed in Italics. In *Lingood* v.

Eade,

(*a*) This queſtion was agitated in the caſe of *Hawkins* and another aſſignees of *Weſtwood* a bankrupt v. *Lukin*, *Tr.* 36 *Geo.* 3. *B. R.*, where Lord *Kenyon* intimated a very ſtrong opinion on the conſtruction of the ſtat. 1 *J.* 1., ſimilar to that given by his Lordſhip in this caſe. The reſt of the Judges conſidered it a caſe of great importance, and of difficulty on account of the former deciſions; and the nonſuit in that caſe was ſet aſide in order that on another trial the queſtion might be put on the record: but the caſe was never brought before the Court again.

Eade, 1 *Atk.* 196., Lord *Hardwicke* alſo thought (*a*) that, to conſtitute an act of bankruptcy by the trader's leaving his houſe, it was neceſſary that he ſhould go with intent to delay or defeat his creditors; for ſpeaking of the opinions of Lord Ch. J. *Lee*, and of Lord Ch. J. *Willes*, given on two trials before them, he approved of the diſtinction taken by the latter, ſaying "he was very well warranted by the words of the ſtatute in the diſtinction he made between abſconding to avoid a debt, and abſconding to avoid a duty only." And in 1 *Bac. Abr.* title "*Bankrupt*," (A), which was written by Lord Ch. B. *Gilbert*, that great Judge ſpeaking of the ſtat. 13 *Eliz. c.* 7., and 1 *Jac.* 1. *c.* 15., ſaid the latter was merely a tranſcript of the former, with the following addition only, "or fraudulently procures his goods to be attached or ſequeſtered, or makes any fraudulent grant of his land &c, to the intent that his creditors may be defrauded, ſhall be adjudged a bankrupt."

(*a*) See alſo the caſe Ex parte *Gulſton*, 1 *Atk.* 139, 193.

POSTEL *againſt* WILLIAMS.

Saturday, Feb. 10th.

If a defendant be ſent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the Court will order the bail-bond to be delivered up to be cancelled.

THE defendant having been ſent out of the kingdom under the alien bill after a bail-bond was given but before the return of the writ, a motion was made on behalf of the bail that the bail-bond might be delivered up to be cancelled.

Garrow, who now ſhewed cauſe againſt that rule, ſaid that no motion could be made until bail above was put in, and that then the motion ſhould only be to ſtay the proceedings; for that if the defendant were to be ſuffered to return to this country, the bail ought to be reſponſible.

Bayley in ſupport of the rule. The bail to the ſheriff cannot put in bail above; for the form of the recogniſance is that the perſon of the defendant is delivered over to the bail: but that is now become impoſſible by an act of the government under the alien bill, the defendant having been ſent out of the kingdom. Beſides if they could put in bail above, it would be a nugatory ſtep, ſince they might apply to the Court the next inſtant to enter an exoneretur on the bail-piece, and not merely to ſtay the proceedings. *Merrick* v. *Vaucher*, *ante*, 6 vol. 50.

The Court were of this opinion, and made the

Rule abſolute.

Saturday, Feb. 10th.

In an action on the 34 *G.* 3. *c.* 23. for pirating a pattern for printing callico, the omiſſion of an averment in the declaration "that the day of firſt publiſhing the pattern was printed at each end of the piece of callico," (which together with the name of the proprietor is required by that ſtatute, the monopoly being limited for three months from the day of firſt publiſhing the pattern,) was holden to be aided by verdict; it being ſtated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the firſt publiſhing thereof, and while the plaintiffs were entitled to have the ſole right of printing the ſame* &c.

Mackmurdo and another *againſt* Smith and others.

IN an action on the caſe for pirating a pattern for printing callico, contrary to the proviſions of the 34 *G.* 3. *c.* 23., the declaration ſtated that the plaintiffs after 1ſt *July* 1794, and before the time of the committing the wrong thereinafter mentioned, had invented and deſigned and had become and were the proprietors of a certain new and original pattern for printing callicoes, and had publiſhed and cauſed to be publiſhed the ſame, and had printed and cauſed to be printed the ſaid pattern upon divers, to wit, 10,000 pieces of callico, and had alſo printed and cauſed to be printed the names of the plaintiffs as the ſaid proprietors of the ſaid pattern at each end of each and every piece of callico ſo by them printed and cauſed to be printed as aforeſaid, according to the form of the ſtatute in that caſe made and provided, to wit, at &c; by reaſon whereof, and by force of the ſtatute in ſuch caſe made and provided, the plaintiffs of right ought to have had and were entitled to the ſole right and liberty of printing and reprinting the ſaid pattern for the term of three months to commence from the day of the firſt publiſhing thereof, to wit, at &c; nevertheleſs the defendants well knowing the premiſes, but diſregarding the ſtatute in that behalf made and provided, and contriving to defraud the plaintiffs, and to deprive them of the profits ariſing from their ſaid invention, during the ſaid term of three months, afterwards, and after the 1ſt *July* 1794, and after the inventing and deſigning and printing and publiſhing of the ſaid pattern as aforeſaid, within the term of three months from the day of the firſt publiſhing thereof, and whilſt the ſaid plaintiffs were ſuch proprietors of the ſaid pattern as aforeſaid and were intitled to have the ſole right and liberty of printing and reprinting the ſame as aforeſaid, to wit, on 1ſt *June* 1797, within that part of *Great Britain* called *England*, to wit, at *London* &c, without the conſent in writing of the plaintiffs firſt had and obtained in that behalf, wrongfully unjuſtly and fraudulently did print and cauſe to be printed the ſaid original pattern of the plaintiffs upon divers, to wit, 1000 pieces of callico, and the ſame pieces of callico, with the ſaid pattern ſo thereupon printed as aforeſaid, did then and there ſell and diſpoſe of without the conſent &c; contrary to the form of the ſtatute in that caſe made and provided, and thereby deprived the plaintiffs of the ſole right and liberty of printing and reprinting the ſaid pattern within the ſaid term of three months, which right and liberty they during all that time ought to have had and enjoyed; by reaſon whereof the plaintiffs during the ſaid term of three months loſt great part of the profits and advantage of their ſaid invention and deſign, to wit, at *London*, &c.

The 34 *Geo.* 3. *c.* 23., on which this action was founded, enacts "That from and after the 1ſt *July* 1794 every perſon who ſhall invent deſign and print, or cauſe to be invented &c, and become the proprietor of any new and original pattern for printing linens cottons &c. ſhall have the ſole right and liberty of printing and reprinting the ſame for three months, to commence from the day of the firſt publiſhing thereof, which ſhall be truly printed with the name of the printer or proprietors at each end of every ſuch piece of linen cotton" &c. And it then proceeds to give the action for infringing ſuch excluſive right within the time limited.

After verdict for the plaintiff, it was moved to arreſt the judgment becauſe there was no averment in the declaration that the day of the firſt publiſhing the pattern was printed at each end of the piece, which together with the name of the proprietor is expreſsly required by the ſtatute.

Erſkine, *Garrow*, *Wood*, and *Lambe*, ſhewed cauſe againſt the rule. 1ſt, This being an action againſt a wrong-doer, it was ſufficient to ſtate generally that the plaintiff had a right to bring his action for the grievance complained of, without ſetting out the grounds of ſuch right; and the declaration would have been good if the other requiſite ſtated, viz. the name of the proprietors being printed at each end of the piece, had been alſo omitted. The precedents of declarations upon the ſtatute of the 8 *G.* 2. *c.* 13. for pirating prints, (which contains the ſame proviſion as the act in queſtion,) are in this general form. They only ſtate generally that the plaintiff during the term limited by the act was entitled to the excluſive right, and that the defendant invaded ſuch right within that period. But 2dly, at any rate the omiſſion of the averment in queſtion, though it might have been bad on demurrer, yet is cured by the verdict. For it appears from the caſe of *Sayer q. t.* v. *Dicey* (a), that the plaintiff could not have recovered at the trial unleſs he had proved that the day of firſt publiſhing

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(a) 3 *Wilſ.* 60.

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publiſhing was printed on the piece: and ſufficient appears upon the face of this declaration to have made ſuch proof neceſſary at the trial. It is alleged that the plaintiffs had cauſed to be printed their names as proprietors of the pattern at each end of every piece of callico *according to the form of the ſtatute*, *whereby* and *by force of the act* the plaintiffs were entitled to the ſole right of printing the pattern *for the term of three months to commence from the day of firſt publiſhing thereof*: and then the breach is afterwards aſſigned *within the term of three months from the firſt day of publication*, *contrary to the form of the ſtatute.* Now none of the facts alleged could be true, nor could any publication by the defendants within the time mentioned be againſt the form of the ſtatute, unleſs it had been proved at the trial that the day of the firſt publiſhing was marked on the callico in the manner preſcribed by the ſtatute. After verdict therefore ſuch proof muſt be taken to have been given, without which the plaintiffs could not have recovered in a caſe like the preſent, where it is not a defect of title apparent on the declaration, but a title imperfectly or defectively ſet out (*a*). And they cited the following caſes where ſuch defects were cured by verdict. *Blackall* v. *Eale* (*b*), where an impoſſible day was laid in the declaration. *Prance* v. *Tringer* (*c*), where in pleading a preſcriptive right of common there was no averment that the beaſts were levant and couchant. *Wicker* v. *Norris* (*d*), where in an action to recover an amerciament in an inferior court, it was not alleged that the defendant was a reſiant within the manor. *Cooke* v. *Pettit* (*e*), where in debt on bond to ſave a pariſh harmleſs from keeping a baſtard child to which there was a plea of non damnificatus, and a replication that the plaintiffs paid 5 *l.* to keep the child &c; and it was not averred that the child was born in the pariſh. *Bickerſtaffe* v. *Purdue* (*f*), where in debt for rent by an executor upon the demiſe of his teſtator the declaration only averred that the reverſion was in the teſtator without ſtating that it was a reverſion of an eſtate for years. *Clarke* v. *King* (*g*), where in a plea of preſcription for common in a que eſtate, it was not expreſsly alleged that the owners of the eſtate had been immemorially entitled to the right of common.

(*a*) *Crowther* v. *Oldfield*, *Salk.* 365. and 2 *Ld. Raym.* 1225. *Ruſhton* v. *Aſpinall*, *Dougl.* 683. and *Eaſt* v. *Eſſington*, *Salk.* 130.

(*b*) *Carth.* 389.

(*c*) *Cro. Jac.* 44.

(*d*) *Rep. Temp. Hardw.* 116.

(*e*) 2 *Wilſ.* 5.

(*f*) 1 *Sid.* 218.

(*g*) *Ante*, 3 vol. 147.

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Law, *Gibbs*, and *F. Vaughan*, contrà, contended that this was not merely matter defectively ſet out, but a defect of title itſelf neceſſary to ſupport the action; which defect it was admitted could not be aided by verdict. The neceſſity of requiring the date to be ſet out was ſtated by Lord *Kenyon* in *Thompſon* v. *Symonds* (*a*) upon a ſimilar act of parliament to be in order that the public may know the period of the monopoly. The true rule was laid down in *Spieres* v. *Parker* (*b*), (which overruled *Wicker* v. *Norris* before cited,) that nothing is to be preſumed after verdict but what is expreſsly ſtated in the declaration, or what is neceſſarily implied from thoſe facts which are ſtated. Here, the allegation that the names of the proprietors were printed on the callico according to the form of the ſtatute does in no reſpect imply that the date of the publication was alſo printed there. The ſtatute requires both; and therefore an allegation that one only was done according to the ſtatute, though true, is no allegation that the other was done. The concluſion which follows in the declaration that *by reaſon thereof*, and *by force of the ſtatute*, the right of action accrued, is inconſequential and not warranted by the premiſes. And if the concluſion of the injury complained of being *contrary to the form of the ſtatute* would help the want of a ſpecific averment of thoſe facts neceſſary to bring the party within the ſtatute, it would have been ſufficient in the caſe of *Spieres* v. *Parker*. But that is no averment of any fact, but a concluſion of law, which the Court ought to ſee is well founded on thoſe facts which are ſtated on the record. Every declaration on a penal ſtatute muſt conclude *contra formam ſtatuti*; but that will not ſupply the place of all other allegations. Nor is it to be inferred after verdict that it was proved at the trial that the date was printed on the callico, on the ſuppoſition that ſuch proof muſt have been given to entitle the plaintiffs to a verdict; for if the defendants had objected at the trial to the plaintiffs' not having proved this fact, the anſwer would have been that it was not neceſſary to prove more than is alleged in the declaration: and beſides, the objection, if well founded, is apparent on the face of the record. In all the caſes cited the facts generally averred neceſſarily included thoſe which ought to have been more technically or ſpecifically ſet forth, but without the proof of which no verdict could have been obtained. As in *Prance* v. *Tringer* (*c*), where a right of common was alleged in pleading, though the levancy and couchancy was omitted to be averred;

(*a*) *Ante*, 5 vol. 45. (*b*) *Ante*, 1 vol. 141. (*c*) *Cro. Jac.* 44.

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but the latter was neceſſary to conſtitute the right of common which was generally alleged. With regard to the caſe of *Sayer* v. *Dicey* (*a*), no argument can be derived from it in favour of the plaintiffs; for it does not appear from the report of that caſe that the date of the firſt publiſhing of the print was not ſtated in the declaration; and it ſeems more probable that it was alleged, otherwiſe the queſtion there made could not have ariſen.

Lord Kenyon Ch. J. The queſtion now before us is not whether or not this objection would have prevailed if the defendants had demurred to the declaration, but whether or not it be a good objection after verdict. It ſeems to be admitted that every fact neceſſary to be proved at the trial in order to ſupport the declaration muſt now be taken to have been proved. Now the act of parliament, on which the action is brought, ſays that the inventor ſhall have the monopoly for three months to commence from the day of the publiſhing, which ſhall be truly printed with the name of the proprietor at each end. It is ſaid that, if the defendant at the trial had objected that the plaintiffs could not recover without proving that they had complied with both theſe requiſites of the act, the anſwer would have been that that was not the time to take advantage of the objection, becauſe it was an objection on the record: but I ought not to have given ſuch an anſwer; for as the declaration ſtates that within the term of three months from the firſt publiſhing, and while the plaintiffs were the proprietors and entitled to this monopoly, the defendants invaded their right and did the act complained of, I ſhould have required evidence of the terminus à quo to ſhew that the monopoly was veſted in the plaintiffs; and this fact could not have been aſcertained without proving that the date was printed at each end of the cloth. I ſhould not have directed the jury to give a verdict for the plaintiffs, unleſs ſuch proof were given; and in point of fact it was given. Perhaps it would have been better at firſt that every declaration ſhould have contained each particular fact neceſſary to be proved: but when it is admitted in the argument that a verdict will cure every defect of allegation, where in order to obtain a verdict the fact muſt have been proved, there is an end of the objection made here. I am clearly of opinion that it was neceſſary for the plaintiffs, who undertook to prove an invaſion of their right during the exiſtence of this monopoly, to prove that they had printed the date on their cloth, otherwiſe they could not have

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(*a*) 3 *Wilſ.* 60.

obtained a verdict; and conſequently that the verdict has cured this ſuppoſed defect, and that the judgment ought not to be arreſted.

ASHHURST J. I am not inclined to reſtrain the operation of the ſtatutes of Jeofails, which are very beneficial ſtatutes; and I think that this is not ſo ſtrong a caſe as ſome of thoſe cited at the bar.

GROSE J. I agree with the rule eſtabliſhed in ſome of the caſes, that nothing is to be preſumed after verdict but what is expreſsly ſtated in the declaration, or what is neceſſarily implied from thoſe facts which are ſtated. Then let us apply that rule to this caſe; it is averred in the declaration that the offence was committed while the plaintiffs were entitled to the monopoly; now they could not have recovered unleſs they had proved not only that they were entitled but alſo the time when their monopoly began.

LAWRENCE J. The allegation in the declaration, that the defendant committed this offence within three months from the time when the plaintiffs firſt publiſhed and while they were the proprietors, is a concluſion of fact and not of law; and that muſt have been proved at the trial, otherwiſe the plaintiffs could not have obtained a verdict.

Rule diſcharged.

CALVERT *againſt* BOVILL.

Saturday, Feb. 10th.

THIS was an action on a policy of inſurance on the captain's goods and private adventure, warranted *American* property, on board the ſhip *Friends*, at and from *London* to *Virginia*.

It was clearly proved at the trial that the property of the goods (which were ſhipped purſuant to an order of council, then rendered neceſſary) was in the plaintiff; that he was an *American*; that the ſhip, which was *American* built, and manned by *American* ſailors, had been conſigned by her owners in *Virginia* to their correſpondents in *London* with a cargo of merchandize, and was afterwards cleared out and ſailed from *London* upon the voyage inſured, having all neceſſary papers on board to evince that ſhe was an *American* ſhip, and that the real place of her deſtination was *Norfolk* in *Virginia*, to which port ſhe belonged. That in the courſe

In an action on a policy of inſurance on goods warranted *American* on board a ſhip from *London* to *Virginia*, a ſentence of a foreign court, which after reciting that "forasmuch "as the true "deſtination "of the veſſel was for "the *Engliſh* "iſlands, "having "been hired "and loaded "at *London*, and having on board eighty barrels of gunpowder, declares the ſhip and cargo a good "prize," is not concluſive evidence againſt the warranty of neutrality; becauſe the ſpecial grounds aſſigned for the ſentence do not neceſſarily lead to ſuch a concluſion.

courſe of her voyage having met with very tempeſtuous weather, and being much damaged, ſhe was obliged from diſtreſs to bear away for the firſt port in the *Weſt Indies*, in which courſe ſhe was captured by a *French* privateer and carried into *Guadaloupe*, where ſhe was condemned by ſentence of the Court there, expreſſed, as to the matter in judgment, in theſe terms; "Seen by us, the "Judges of the Court of Commerce, the papers which have "been here produced reſpecting the capture of the brig *Friends*, "Captain *Thomas Calvert*, made by the privateer *La Legere*, "Captain *A. T.*, and having heard on that ſubject the opinion "of citizen *Serand* commiſſary of the Executive Directory of "the ſaid court, and alſo heard the report, and conſidered the "whole; foraſmuch as the true deſtination of the ſaid veſſel "was for the *Engliſh* iſlands, having been hired and loaded at "*London*, and that there has been found on board her eighty "barrels of gunpowder (*a*); the Court declares the ſaid brig "*Friends a good prize* for the benefit of the captors, together "with her tackle, apparel, cargo, and generally all that belongs to "her," &c.

The ſole queſtion was, Whether the ſentence of condemnation was concluſive evidence againſt the warranty of the goods being *American* property? A verdict was taken for the plaintiff with liberty for the defendant to move to ſet it aſide and enter a nonſuit if the Court ſhould be of opinion that the ſentence was concluſive; which motion having been accordingly made, and a rule niſi obtained,

Erſkine and *Park* ſhewed cauſe againſt it. Admitting that a ſentence of condemnation by a foreign Court of Admiralty was concluſive evidence of any fact on which ſuch ſentence was founded (*b*), admitting alſo that a ſentence of condemnation generally *as lawful prize* would be concluſive evidence againſt a warranty of neutrality, according to *Saloucci* v. *Woodmaſs* (*c*), they contended that the ſentence in this caſe ſetting forth on the face of it the ſpecific grounds on which it proceeded did not conclude or in any manner affect the queſtion of neutral property. For the judgment was not on the ground that the ſhip or cargo was not *American*, or that it was enemy's property, nor was the condemnation general as lawful prize: but three diſtinct grounds

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(*a*) This was part of the captain's adventure, the reſt conſiſting of ſlops, porter, cheeſe, and ſhip chandlery.

(*b*) See the caſes on this head collected in *Park on Inſurance* 403, &c. 1ſt ed.

(*c*) *B. R. Hil.* 24 *Geo.* 3. *Park.* 413.

are ſtated in the ſentence as the avowed foundation of it; the deſtination of the ſhip to the *Engliſh* iſlands, her having been laden at *London*, and her having a quantity of gunpowder on board; all of which may be true, and yet the ſhip and cargo may be *American* and entiled to the privileges of neutrality. The deſtination of the veſſel was adopted from neceſſity, her loading at *London* was on her return home; and her having gunpowder on board was no breach of the laws of neutral nations, the original deſtination being to a neutral ſtate; though it would not have varied the caſe if it had been originally intended for the *Engliſh* iſlands, they not being in a ſtate of ſiege at the time, and it not being ſhewn to be an infraction of any treaty ſubſiſting between *France* and *America* in that reſpect. This caſe therefore falls within the principle of *Saloucci* v. *Johnſon* (*a*), where it was holden that a ſentence of condemnation of a ſhip ſtated to be neutral for refuſing to admit of a ſearch, and for not having a charter-party on board, being on the face of it manifeſtly unjuſt, contradictory, and not warranted by the laws of nations, was not concluſive againſt the aſſured. It was not even ſhewn in this caſe that by any *French* ordinance the grounds of condemnation ſtated could be juſtified; though if there had been ſuch an one, as it would have been partial and unjuſt in itſelf, it would not, according to *Mayne* v. *Walter* (*b*), have been concluſive againſt the warranty of the aſſured, no notice of any ſuch ordinance having been proved againſt him, and therefore no fraudulent concealment from the underwriters.

Gibbs and *Marryat* contrà. This Court muſt preſume that the *French* court proceeded upon the law of nations, there being no treaty referred to, and no other ordinance to which the ſentence can relate. But the only ground on which the ſentence can be juſtified by the law of nations is that the property was in fact *Britiſh* and not *American*; it is therefore concluſive of that fact, and no evidence ought to have been admitted in this caſe to controvert it. The previous facts which are recited in the ſentence are not per ſe grounds of condemnation, but they were evidence of the fact of the property being *Britiſh* if there were nothing elſe to contravene them. But whether the *French* court drew a proper concluſion of fact or not from the evidence before them cannot now be inquired into. The objection therefore goes to the admiſſibility of the evidence which raiſes the doubt in this caſe.

(*a*) *B. R. Trin.* 25 *Geo.* 3. *Park.* 415. (*b*) *B. R. E.* 22 *Geo.* 3. *ib.* 414.

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Calvert *againſt* Bovill.

The adjudication of the veſſel and cargo being *good prize* is of itſelf concluſive againſt the warranty of it's being *American*, *i. e.* neutral, property: it was ſo conſidered in *Saloucci* v. *Woodmaſs* (*a*). It muſt be preſumed, ſaid Lord *Mansfield*, from the ſentence of condemnation, as no other cauſe appears, that it proceeded on the ground of the property's belonging to an enemy. So here, as no other cauſe appears to which it can juſtly be attributed, the ſame preſumption muſt be made.

Lord Kenyon Ch. J. That the juſtice and honeſty of the caſe are with the plaintiff is beyond all doubt; and that the ſhip was *American* and the goods the property of an *American* is equally clear: but it is contended that though in point of fact the goods were the property of an *American*, the ſentence of condemnation precludes the plaintiff from aſſerting that fact. I yield to the caſes cited, which ſhew that to a certain degree this Court will ſupport the proceedings in foreign courts by preſuming that their ſentences are juſt; and I will not make any exception at preſent of the proceedings of the *French* Courts of Admiralty. But when an attempt is made to pervert the juſtice of the caſe, it becomes neceſſary for us to ſee whether the deciſion of the Court at *Guadaloupe* has ſo determined on the fact of neutrality that we cannot examine into it. But it has been ſaid, as nothing can juſtify the ſentence of the *French* Court of Admiralty but the fact that this was *Britiſh* property, we muſt conclude that they condemned the ſhip and cargo on the ground that they were *Britiſh* property: but that is a concluſion againſt all the facts proved in the caſe. If indeed that court had ſtated in their ſentence that they condemned the goods becauſe they were *Britiſh* property, I ſhould have conſidered myſelf bound by their ſentence, but they have aſſigned other reaſons for their adjudication; the expreſs grounds of the ſentence of condemnation are that the ſhip was deſtined for one of the *Weſt India* iſlands, that ſhe was hired and loaded at *London*, and that ſhe had a certain quantity of gunpowder on board, therefore they condemned her and her cargo as good prize. Then it is impoſſible for us to conclude that the *French* court decided on the ground that this was *Britiſh* property, when all the evidence in the cauſe and the reaſons expreſsly given by them for their judgment lead to a contrary concluſion.

Ashhurst J. declared himſelf of the ſame opinion.

(*a*) *B. R. Hil.* 24 *Geo.* 3. *Park.* 413.

LAWRENCE J. (*a*) It is ſaid that whatever is adjudged by the ſentence of the foreign court is concluſive on the parties, however unjuſtly they may have decided: but it is ſufficient to ſay that in this caſe they have not decided that fact on which the defendant relies. If that court had condemned the goods becauſe they were the property of an enemy, that judgment would have been concluſive here: but, ſo far from the *French* court at *Guadaloupe* having decided that fact, they have expreſsly given other reaſons for their ſentence. The caſes alluded to in the argument ſeem to have eſtabliſhed this, that if we can collect from the ſentence itſelf on what ground the foreign court decided, that is concluſive in any action brought in this country: but if it be ambiguous or it does not appear on the face of the ſentence on what ground they proceeded, then we may receive evidence to ſhew what were the grounds of the deciſion abroad.

Per Curiam Rule diſcharged.

(*a*) Mr. J. *Groſe* was gone to try cauſes at *Guildhall* before this caſe came on.

The KING *againſt* The Sheriff of MIDDLESEX.

Monday, Feb. 12th.

THE writ was returnable on the 18th of *November* laſt, when the ſheriff was ruled to return the writ; on the return of the writ the defendant was in the *Fleet* priſon in an action in *C. B.*; on the 28th of *November* he was removed from the *Fleet* by habeas corpus, and on the ſame day he was ſurrendered in diſcharge of his bail in this action and committed to the cuſtody of the marſhal, where he has been ever ſince; and on the next day, the 29th, the plaintiff was ſerved with a notice of the above ſurrender. On the 23d of *November* the ſheriff was ruled to bring in the body; on the 24th of *November* bail above was put in, though the time for putting in bail expired on the 22d; the rule for bringing in the body expired on the 28th of *November*, and on the 24th *January* a rule was granted directing an attachment to iſſue againſt the ſheriff for not bringing in the body. Afterwards the defendant obtained a rule calling on the plaintiff to ſhew cauſe why that rule directing the attachment ſhould not be ſet aſide for irregularity; againſt which

Sellon ſhewed cauſe on a former day in this term. 1ſt, The rule of Court, *Trin.* 33 *Geo.* 3. (*ante*, 5 vol. 368.) does not extend to

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The King *againſt* The Sheriff of Middleſex.

to ſuch a caſe as the preſent, where bail was irregularly put in. The defendant not having put in bail in time, the bail that were put in in this caſe muſt be conſidered as no bail at all. *Hardwick* v. *Bluck*, *ante*, 297. 2dly, Though the ſurrender was made on the 28th of *November*, no notice was given of it to the plaintiff until the 29th, and the ſurrender is not valid until notice: but before ſuch notice was given the ſheriff was in contempt. 3dly, The affidavit on which the preſent rule is obtained is wrongly entitled "The King *v.* The Sheriff of *Middleſex*;" for until the attachment *iſſues* the proceedings are on the civil ſide of the court, *Wood* v. *Webb*, *ante*, 3 vol. 253. The affidavit ſhould have been entitled in the original cauſe, this not being a rule to ſet aſide an attachment, but to ſet aſide "the rule directing an attachment to iſſue."

Marryat in ſupport of the rule. 1ſt, This is diſtinguiſhable from the caſe of *Hardwick* v. *Bluck*, where the queſtion aroſe between the plaintiff and the bail: but as between the plaintiff and the ſheriff the time to put in bail does not expire until the time for bringing in the body is paſſed. In *R.* v. the Sheriff of *Eſſex*, *H.* 36 *Geo.* 3. *B. R.* the Court ſaid the contempt is not incurred by the ſheriff until the day on which the rule to bring in the body is paſſed; for the ſheriff has the whole of that day to render. The rule of Court alluded to, after reciting that by the then practice the bail could not render the defendant after a rule had been granted againſt the ſheriff to bring in the body before the bail had juſtified, orders that the bail may ſurrender the principal, notwithſtanding ſuch rule at any time *before the expiration thereof*, *i. e.* before the expiration of the day for bringing in the body. 2dly, The notice of the ſurrender is no part of the ſurrender itſelf, but is required to be *without delay* for the purpoſe of preventing further expence: now here notice was given without delay, on the next day, and no further expence was incurred. The point in queſtion does not appear to have been expreſsly decided in this Court, but in the Common Pleas it is the eſtabliſhed practice that though the rule to bring in the body has expired, yet if the defendant juſtifies bail before the plaintiff moves for an attachment againſt the ſheriff, it is in time to prevent the attachment. *Thorold* v. *Fiſher*, 1 *H. Bl. Rep.* 9. 3dly, The caſe of *R.* v. The Sheriff of *Middleſex*, *ante*, 439., gives a deciſive anſwer to this objection; which was allowed by the Court.

Cur. adv. vult.

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The King *againſt* The Sheriff of Middlesex.

Ashhurst J. (*a*) now delivered the opinion of the Court. This motion was made on the conſtruction of the rule of Court, *Trin.* 33 *Geo.* 3. whether the ſheriff could put in bail, in order to comply with the rule for bringing in the body, without juſtifying, and on the authority of *Hardwick* v. *Bluck*: the Maſter, on reconſideration, thinks he was miſtaken (*b*) in that caſe in his report of the practice. And we think that the ſheriff is not obliged to juſtify his bail, and that the rule of Court, *Trin.* 33 *Geo.* 3. extends to the caſe of the ſheriff; and therefore that this rule ſhould be made abſolute.

Rule abſolute.

(*a*) Lord *Kenyon* Ch. J. was gone to *Guildhall* when this caſe was argued.

(*b*) The Court alſo denied the authority of *Hardwick* v. *Bluck* in another caſe in this term, *Calow* v. *Dury*.

Pleydell *againſt* The Earl of Dorchester.

Monday, Feb. 12th.

In an action on the caſe for diverting the plaintiff's water-courſe, where the jury under circumſtances of aggravation gave 3000 *l.* damages, the court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved: but they directed that the former verdict ſhould ſtand as a ſecurity in the mean-time for the damages which might be given on the ſecond trial.

In an action on the caſe for diverting the plaintiff's water-courſe, wherein the damages were laid at 5000 *l.*, the jury (which was a ſpecial one in the county of *Dorſet*) gave a verdict for 3000 *l.*; which this Court on a former day ſet aſide upon motion, as being exceſſive, and not warranted by the evidence; it being a mere queſtion of property as ſtated on the record, where there was ſomething whereby to meaſure the damages, namely, the deterioration of the property itſelf; and therefore not like caſes of perſonal injuries, as actions for adultery, ſlander, &c. Though, they ſaid, that even in ſuch a caſe as the preſent, which was attended with ſeveral circumſtances of aggravation, they would not meaſure the damages which the jury had given in a nice balance; but making very liberal allowance in that reſpect, they were ſtill bound to take care that the verdict ſhould not greatly exceed the damage proved. But on this day

The Court ſaid that having taken this matter into their conſideration ſince it was laſt mentioned in court, and having referred to ſeveral precedents, particularly one in *Sty.* 466. by which it appeared to have been the practice in ſuch caſes to let in the defendant to a new trial upon the terms of the former verdict ſtanding as a ſecurity in the mean time for the damages which might be given upon another trial, they thought the rule was founded in juſtice and convenience, and fit to be enforced not only upon this but upon all future occaſions of the ſame kind.

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PLEYDELL *againſt* The Earl of DORCHESTER.

Upon thoſe terms therefore the rule for ſetting aſide the former verdict and granting a new trial was

Made abſolute.

Garrow, *Lens*, *Dampier*, and *Wollaſton*, in ſupport of the rule.

Bond, *Dallas*, *Gibbs*, and *Praed*, againſt it.

Monday, Feb. 12th.

PITMAN *againſt* HAYNES.

A note for the weekly payment of 3*s*. 6*d*. under the Lords' act muſt be ſtamped.

The defendant having been brought up to be diſcharged, the plaintiff gave him a note for the weekly payment of 3*s*. 6*d*. under the Lords' act in the uſual form, but the note was not ſtamped; and the defendant moved to be diſcharged out of cuſtody becauſe the plaintiff had not given him a valid note.

The Court were of opinion that ſuch a note ought to be ſtamped, and diſcharged the defendant out of cuſtody.

Lens for the plaintiff.

Manley for the defendant.

Monday, Feb. 12th.

BERRY *againſt* ANDERSON.

The defendant cannot put in a ſpecial demurrer when he is under terms of pleading iſſuably.

The defendant, being under an order to plead iſſuably, put in a demurrer aſſigning ſeveral cauſes of demurrer, notwithſtanding which the plaintiff ſigned judgment as for want of a plea. And a rule having been obtained calling on the plaintiff to ſhew cauſe why the judgment ſhould not be ſet aſide for irregularity,

The Court (after argument) ſaid that a demurrer that did not go to the merits (*a*) of the caſe was not a plea within ſuch an order according to the practice of the Court. But as the defendant's counſel aſſured the court that they thought there was a ſubſtantial ground of demurrer,

The Court made the rule abſolute, on the defendant's undertaking to ſtrike out the ſpecial cauſes of demurrer.

Gibbs and *Lawes* in ſupport of the rule.

Mingay againſt it.

(*a*) Vid. *Stonehouſe* v. *Vowell*, *Say. Rep.* 88; *Dewey* v. *Sopp*, 2 *Str.* 1185; *Gray* v. *Aſhton*, 3 *Burr.* 1788; and *Wright* v. *Ruſſel*, 2 *Bl. Rep.* 923.

END OF HILARY TERM.

1798.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Eaſter Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

DOE on the Demiſe of CANDLER and others *againſt* SMITH.

Friday, April 27th.

Under a deviſe to *A.* and the heirs of her body for ever as tenants in common and not as joint tenants, and in caſe *A.* die before twenty-one or without leaving iſſue of her body then to *B.*; held that *A.* took an eſtate tail.

See Sugd. Law of Vendors &c. 619. in the notes.

THIS was an ejectment for certain lands in *Kirkby Malzeard* in *Yorkſhire*, on a joint demiſe by *H. Candler* the younger *Anna Bella Candler* and *Mary Candler*, and alſo on the ſeparate demiſes of thoſe three perſons; and on the trial a ſpecial caſe was reſerved for the opinion of this Court.

W. Aſcough, being ſeiſed in fee of the premiſes in queſtion, by his will duly executed, dated 17th *June* 1775, after giving to his wife an annuity to be iſſuing out of his freehold eſtate, deviſed the ſame as follows; "I hereby give and deviſe all my freehold meſſuages lands &c. (ſubject to the payment along with my perſonal eſtate of all my debts legacies and funeral expences) unto my daughter *Mary Aſcough* and the heirs of her body lawfully to be begotten for ever, as tenants in common and not as joint tenants, and in caſe my ſaid daughter ſhall happen to die before twenty-one, *or* without leaving iſſue on her body lawfully begotten, then I give and deviſe all thoſe my ſaid freehold meſſuages lands &c. to *R. Aſcough* his heirs and aſſigns for ever." *Mary Aſcough* having attained her age of twenty-one years intermarried with *H. Candler*, and they have iſſue three children, viz. *Henry*, *Anna Bella*, and *Mary Candler*, who are the leſſors of the plaintiff, and were all living at the time of levying the fine and executing the feoffment hereinafter mentioned. In *Trinity* term 1796 *H. Candler* and *Mary* his wife levied a fine ſur conuſance de droit come ceo &c. of the premiſes in queſtion, and by deed of feoffment dated the 1ſt of *January* 1797, with livery of ſeiſin thereon, conveyed the ſame and declared the uſes of the fine to the defendant *J. Smith* and his heirs for ever.

The queſtions reſerved for the conſideration of the Court are Whether *Mary* the wife of *Henry Candler* the elder took an eſtate tail in the premiſes above mentioned to be conveyed to the defendant, or an eſtate for life only? and Whether the plaintiff is entitled to recover on the demiſes above ſtated?

Holroyd for the plaintiff. The deviſee *Mary Aſcough* (afterwards *Candler*) only took an eſtate for life in the premiſes in queſtion, with remainder to her children either in fee or in tail. If the deviſe had only been to her and to the heirs of her body, there is no doubt but that ſhe would have taken an eſtate tail: but the words that immediately follow, "as tenants in common and not as joint tenants," ſhew that this was not the deviſor's intention; for the children cannot take as tenants in common if the anceſtor takes an eſtate tail. In *Doe* d. *Long* v. *Laming* (*a*), where gavelkind lands were deviſed to *M. Read* and to the heirs of his body lawfully to be begotten as well females as males, and to their heirs and aſſigns for ever, to be divided equally ſhare and ſhare alike, as tenants in common and not as joint tenants, it was holden that the words "heirs of the body" were words of purchaſe and not of limitation. It is true that in that caſe words of limitation were engrafted on thoſe words; but that alone was not the ground of deciſion; for Lord *Mansfield* alſo relied on the words "to be divided equally ſhare and ſhare alike as tenants in common and not as joint tenants," as being inconſiſtent with the idea of the firſt taker having an eſtate tail. So in *Liſle* v. *Gray* (*b*), "heirs male of the body" were conſidered as words of purchaſe by reaſon of other words being ſuperadded to them, ſhewing that the parties did not intend to uſe the words "heirs of the body" in the ordinary ſenſe. The ſame principle was recogniſed in the caſe

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(*a*) 2 Burr. 1100.

(*b*) 2 Lev. 223.

caſe of *Allgood* v. *Withers*, cited in 2 *Burr.* 1107. Again in *Doe* d. *Davy* v. *Burnſall* (*a*), where the deviſe was to *M. Owſtwick* and the iſſue of her body lawfully to be begotten as tenants in common, but in default of ſuch iſſue or being ſuch they ſhould all die under twenty-one without leaving iſſue then over, it was holden that *M. Owſtwick* took only a life eſtate with remainder to her children in fee as purchaſers. Here in the deviſe over "if his daughter ſhould die before twenty-one *or* without leaving iſſue," the word *or* muſt be conſtrued "and:" the deviſor could not intend that the deviſe over ſhould take effect if his daughter ſhould die under twenty-one *leaving iſſue*; and according to *Doe* d. *Davy* v. *Burnſall*, and a variety of other caſes, the word "or" in a will may be read "and" where the intention of the deviſor requires ſuch a conſtruction.

Chambre contrà was ſtopped by the Court.

Lord Kenyon, Ch. J. It is a rule of conſtruction in caſes of this kind, ſettled by a variety of deciſions, but particularly by that of *Robinſon* v. *Robinſon* (*b*) firſt in this Court and afterwards in the Houſe of Lords, that where it appears in a will that the teſtator had a general intention and alſo a ſecondary intention, and they claſh, the latter muſt give way to the former. In that caſe beyond all doubt the teſtator meant that the firſt taker ſhould take only an eſtate for life, becauſe he ſaid ſo in expreſs terms: but as it appeared that this was inconſiſtent with his general intent, as expreſſed in the ſubſequent parts of the will, it was determined both by this Court and by the Houſe of Lords that the firſt taker (*L. Hicks*) ſhould take an eſtate tail in order to effectuate the deviſor's general intent, notwithſtanding the words of the will were "to *L. Hicks* for and during the term of his natural life *and no longer*." The caſe of *Doe* d. *Long* v. *Laming*, which has been referred to, is diſtinguiſhable from the preſent; for there were words of limitation ſuperadded to the "heirs of the body" of the firſt taker. In giving my opinion on this caſe I cannot do better than repeat what was ſaid by Mr. J. *Wilmot* in *Roe* d. *Dodſon* v. *Grew* (*c*), where the words of the deviſe were "to *G. Grew* for life, and after his deceaſe to the uſe of the iſſue male of his body lawfully to be begotten and the heirs male of the body of ſuch iſſue male, and for want of ſuch iſſue male then to *G. Dodſon* his heirs and aſſigns for ever;" only premiſing that

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(*a*) *Ante*, 6 vol. 30.

(*b*) 1 *Burr.* 38.

(*c*) 2 *Wilſ.* 323.

1798.

Doe dem. Candler *against* Smith.

that in this caſe the deviſe is "to his daughter *M. Aſcough* and the heirs of her body lawfully to be begotten for ever as tenants in common and not as joint tenants, and if his ſaid daughter ſhould happen to die before twenty-one or without leaving iſſue on her body then to *R. Aſcough* his heirs and aſſigns for ever:" here are no words of limitation added to the eſtate given to the children (ſuppoſing they took as purchaſers) and yet the remainder over is not to take effect until there was a general failure of her iſſue, ſo that there muſt be an eſtate to comprehend all her children for ever. In that caſe *Wilmot*, J. ſaid (*a*) "The intention of the teſtator clearly was to give *G. Grew* an eſtate for life only, but his intention alſo clearly was that all the ſons of *G. Grew* ſhould take in ſucceſſion: both theſe intentions cannot take place; for if the deviſee *G. Grew* took only an eſtate for life, his ſons could never have taken; and although it eventually happened that he had no ſons, yet we muſt conſider this caſe as if he had had iſſue. Therefore to enable the ſons of *G. Grew* to take, *G. Grew* muſt be adjudged to have been tenant in tail; for the teſtator's great intention moſt clearly was, that the lands ſhould never go over to the leſſor of the plaintiff in remainder but upon a failure of iſſue of *G. Grew*." The general propoſition that I ſtated at firſt is ſupported by this caſe, which was in a great meaſure founded on what had been before decided in the caſe of *Robinſon* v. *Robinſon*. I admit that in this caſe the teſtator intended that his daughter *M. Aſcough* ſhould only take an eſtate for her life, and that her children ſhould take as purchaſers: but then he alſo intended that all the progeny of thoſe children ſhould take before any intereſt ſhould veſt in his more remote relations: now the latter intention cannot be carried into effect unleſs *M. Aſcough* takes an eſtate tail. In order therefore to give effect to the deviſor's general intention, according to the fair conſtruction of the will, *M. Aſcough* muſt take an eſtate tail.

Per Curiam, Poſtea to the defendant.

(*a*) His Lordſhip read a manuſcript note of this caſe, but in ſubſtance it agreed with the report in *Wilſon*. See now Sir Eardley Wilmot's own report of his argument in his Notes & Opinions 272.

Friday, April 27th.

If a ſum be depoſited upon the event of an illegal wager, the loſer may recover back his depoſit after the event of the wager.

Lacaussade *againſt* White.

This was an action of aſſumpſit on an agreement made on the 11th of *January* 1797, by which the defendant, in conſideration that the plaintiff had paid him 100*l*, agreed to pay the plaintiff 300*l*. "if articles forming the baſis of a peace and ſigned by ſome official characters, by which hoſtilities would ceaſe and would not recommence, were not ſettled between *England* and *France* on or before the 11th of *September* 1797." The declaration alſo contained the common money counts. On the trial at the *Weſtminſter* ſittings before Ld. *Kenyon* Ch. J. it was admitted that the wager was illegal, and that the plaintiff could not recover on the ſpecial count: but by the direction of the learned Judge the plaintiff obtained a verdict for the 100*l*. paid by him to the defendant, which

Gibbs now moved to ſet aſide. He took a diſtinction between caſes of this ſort where the contract on which the wager turned was executed and where it was executory. He admitted that where a wager is illegal either party may recover back his depoſit ſo long as the contract remains executory, that is, before the event happens which was to decide the wager; but he contended that after the happening of ſuch an event it was too late for the loſer to inſiſt on a return of his ſtake. According to the caſe of *Lowry* v. *Bourdieu* (*a*) he ſhould make his option to reſcind the contract while it is executory; otherwiſe he firſt takes the chance of the event happening in his favour, and when that is decided againſt him he turns round and inſiſts on the illegality of the contract. In theſe caſes where the parties are in pari delicto, the rule applies that melior eſt conditio poſſidentis; and the plaintiff muſt recover by the ſtrength of his own title and not by the weakneſs of the defendant's. But

The Court refuſed the rule; ſaying that it was more conſonant to the principles of ſound policy and juſtice, that wherever money has been paid upon an illegal conſideration it may be recovered back again by the party who has thus improperly paid it, than by denying the remedy to give effect to the illegal contract. And they referred to a caſe determined at Niſi Prius before *Groſe* J. which was afterwards brought before them upon a motion for a new trial (*b*)

Rule refuſed.

(*a*) Dougl. 467. See alſo *Andree* v. *Fletcher*, *ante*, 3 vol. 266.

(*b*) Vid. *Cotton* v. *Thurland*, *ante*, 5 vol. 405.

Saturday, April 28th.

The King *againſt* Mordecai Hymen.

When a ſtatute creates a penalty and ſays that one moiety ſhall be to the uſe of the king and the other to a common informer, the king may ſue for the whole unleſs a common informer has commenced a qui tam ſuit for the penalty.—In ſuch a caſe the king may recover the penalty by an information filed by the attorney general in this court.

This was an information by the attorney general againſt the defendant for a penalty of 500*l.* under the ſtatute 24 *Geo.* 3. *ſt.* 2. *c.* 47. *ſ.* 32. which enacts that "If any perſon ſhall give offer or promiſe to give any bribe recompence or reward to or make any colluſive agreement with any officer of the navy cuſtoms or exciſe to do conceal or connive at any act whereby any of the proviſions made by this or any other act of parliament relative to his Majeſty's cuſtoms or exciſe may be evaded or broken, every ſuch perſon ſhall for each offence (whether the ſame offer propoſal promiſe or agreement be accepted or performed or not) forfeit the ſum of 500*l.*" The information alſo contained counts at common law for bribing the officer of the cuſtoms.

The defendant having been convicted, a doubt aroſe whether the king could ſue for the whole penalty (*a*), and if he could, whether it ſhould not be by a proſecution in the exchequer, and the matter ſtood over until this day.

The counſel for the proſecution now ſtated that there were many precedents in the Crown-office of ſimilar proceedings; that though in *R.* v. *Clark* and others (*b*), which was an information by the attorney-general for a penalty againſt the defendants for aſſaulting and reſiſting cuſtom-houſe officers in the execution of their duty, on the ſtat. 8 *Geo.* 1. *c.* 18. *ſ.* 25., ſeveral objections were taken in arreſt of judgment, this objection was not mentioned, and judgment was given againſt the defendants; and that in *Com. Dig.* title "Information," (A. 3), it is ſaid "Where a ſtatute gives a penalty to the king and to him who will ſue for it, *if* the king has not exhibitted an information any common informer may," evidently implying that a common informer cannot ſue if the king has already exhibited an information for the penalty.

The Court, being ſatisfied with theſe authorities, ordered the defendant to pay the whole penalty.

Mingay, *Law*, *Garrow*, and *Dampier* for the crown.

Erſkine for the defendant.

(*a*) By the 38th ſect. of the ſtat. 24 *Geo.* 3. *c.* 47. it is enacted that one moiety of the ſeveral penalties in the act mentioned ſhall be to the uſe of his Majeſty his heirs and ſucceſſors, and the other moiety to the uſe of ſuch perſon as ſhall inform proſecute or ſue for the ſame; and that the penalties may be ſued for in any of his Majeſty's courts of record at *Weſtminſter*.

(*b*) *Cowp.* 610.

Tueſday, May 1ſt.

PARKER and Others Aſſignees of STEEL a Bankrupt *againſt* MANNING.

In an action of covenant for rent on an indenture brought by the aſſignees of the leſſor, (a bankrupt) the leſſee cannot plead that the leſſor nil habuit in tenementis.

IN covenant, the declaration ſtated that *Steel* on the 29th of *Sept.* 1792, before he became a bankrupt, by indenture demiſed certain premiſes to the defendant for fifteen years at the yearly rent of 140*l.*, by virtue of which demiſe the defendant entered; and the breach aſſigned was the non-payment of 700*l.* for five years rent due ſince the bankruptcy of *Steel.*

The defendant pleaded (inter alia) that *Steel* before the making of the indenture in the declaration mentioned, to wit, on the 20th of *Sept.* 1792, became a bankrupt and ſo continued until and at the time of the making of the indenture; and that before and at the time of the making and ſealing thereof one *J. Watſon* (ſince deceaſed) and one *T. Thornhill* were ſeiſed in fee of the premiſes thereby alleged to have been demiſed to the defendant, and *Thornhill* is ſtill ſeiſed thereof, *and that* Steel *had not any eſtate right or title in or to the ſame.*

To this plea there was a general demurrer.

Giles in ſupport of the demurrer. It is perfectly clear that where a leaſe is made by indenture the leſſee is eſtopped to plead that his leſſor nil habuit in tenementis. *Lit. ſect.* 58.; *Co. Lit.* 47. *b.* And if the leſſee be eſtopped to plead ſuch a plea in an action brought by his leſſor, he is equally eſtopped in an action brought by the aſſignees of the leſſor who is become a bankrupt; for the aſſignees of a bankrupt ſtand preciſely in the ſame ſituation as the bankrupt did. And, as the eſtoppel appears on the record, the plea is bad on a general demurrer. *Palmer* v. *Ekins*, 2 Ld. *Raym.* 1550.

Marryat contrà. It need not be diſputed but that where a demiſe is by indenture the leſſee is eſtopped to ſay in anſwer to an action for rent brought by the leſſor that his leſſor had no title: but this is an action not by the leſſor himſelf, but by his aſſignees; and the ſtat. 32 *Hen.* 8. *c.* 34. only gives an action to the aſſignee of the leſſor in caſes where the right to the eſtate paſſes: now here it is admitted by the demurrer that no right paſſed to the leſſee. This is not ſimply a plea that the leſſor had nothing in the premiſes, but it ſhews that the title was veſted in other perſons. And the defendant is not eſtopped to plead ſuch a plea;

for

for there can be no eſtoppel unleſs it is mutual and operates on both parties. If an infant or a feme covert demiſe by indenture the leſſee is not eſtopped to plead nil habuit in tenementis, becauſe the leſſor is not bound by ſuch a demiſe. So where the Crown grants by letters patent, as there is no eſtoppel againſt the Crown, there cannot be any eſtoppel againſt the tenant. Then here, as the aſſignees would not be eſtopped by this indenture, neither is the defendant. Eſtoppels only apply as between the parties themſelves. But, ſecondly, even if the plea cannot be ſupported, the plaintiffs cannot recover becauſe the declaration is too general. They ſhould have ſet out a title. It is a well known diſtinction in the inſtance of executors ſuing for rent; if they claim rent due in the teſtator's lifetime they need not ſet out any title, but if they ſue for rent accruing due after the teſtator's death, they muſt. The ſame rule holds in the caſe of aſſignees. *Noke* v. *Awder*, *Cro. Eliz.* 373. 436. As this is a demand for rent due ſince the bankruptcy of *Steel*, the aſſignees ſhould have ſhewn a title.

The Court thought there was no weight in the objection to the declaration; and that, if there were, the defendant ſhould have demurred ſpecially.

Giles in reply. This caſe is diſtinguiſhable from that of *Noke* v. *Awder*; for there (as was obſerved in 2 Ld. *Raym.* 1553.) it appeared on the face of the declaration that the plaintiff had no title: whereas here it does not appear on the declaration that the plaintiffs have no title. In actions of covenant for rent it is not neceſſary to ſet out a title in the leſſor; it is ſufficient to ſtate the demiſe and the covenant by the defendant.

Lord KENYON, Ch. J. That the juſtice and honeſty of this caſe are with the plaintiffs it is impoſſible to doubt. The defendant, who has occupied the premiſes in queſtion for five years and taken all the profits of the eſtate during that period, on being called upon for rent refuſes to pay, becauſe (he ſays) the leſſor had no right to confer a title on him. But is this the law? The caſes cited on behalf of the defendant do not prove that it is. If indeed the defendant had been evicted, to be ſure he could not have been compelled to pay rent, and he might have pleaded that fact in anſwer to the plaintiff's demand. That, generally ſpeaking, an indenture operates by way of eſtoppel againſt the tenant, and precludes him from controverting the title of his landlord, is proved by the paſſage referred to in *Co. Lit.* 47. *b.*, and by a variety of other caſes. Then it is ſaid that eſtoppels muſt be mutual, that unleſs they affect both parties they affect neither, and the inſtances of demiſes by infants and femes coverts have been adduced: but that ariſes from their imbecility, for they can do no act to eſtop themſelves. But what is this caſe? When the parties to this leaſe executed it, the one was taken to be the leſſor, the other the leſſee; both of them executed the leaſe: now it is not pretended that there was not an incipient eſtoppel; if ſo, the eſtoppel muſt continue as long as the privity of eſtate continues. And that deſtroys the foundation of the defendant's argument. Therefore on principles of law as well as of honeſty I am clearly of opinion that the plea is no anſwer to the declaration, and that the defendant is bound to pay the rent demanded.

ASHHURST J. The general rule is that a tenant cannot be permitted to controvert the title of his landlord; and it is founded on good ſenſe; for ſo long as the leſſee continues to enjoy the land demiſed it would be unjuſt that he ſhould be permitted to deny the title under which he holds the poſſeſſion. But the rule is otherwiſe where the tenant is evicted. In this caſe the rights of the parties are the ſame as at firſt; for the aſſignees of the leſſor are to all intents and purpoſes conſidered in the ſame ſituation as the leſſor was before his bankruptcy; they ſucceed to all his rights, and are ſubject to all his equities. There is no reaſon why the eſtoppel, that operates as between the leſſor and the leſſee, ſhould not equally operate as between theſe parties.

GROSE J. As far back as the time of *Littleton* we find it laid down as a rule that where the demiſe is by indenture the tenant is eſtopped to plead nil habuit in tenementis. Then what is this caſe? It is alleged that the defendant has occupied this eſtate for five years, which is not denied; and as there has been no eviction he ought to be eſtopped to ſay that the leſſor had no title.

Per Curiam (*a*), Judgment for the plaintiffs.

(*a*) Mr. J. *Lawrence* was abſent.

1798.

Tueſday, May 1ſt.

WITHY *againſt* WOOLLEY.

Where an ejectment was brought to recover poſſeſſion of lands extended under an elegit upon a judgment confeſſed, which had been entered up upon a warrant of attorney given for ſecuring an annuity, it is too late for the grantor to object to the conſideration of ſuch annuity upon a ſummary application for ſtaying the proceeding after verdict in ſuch ejectment, becauſe he had an opportunity of making his defence to the action.

THIS was a rule calling on the plaintiff to ſhew cauſe why the bond executed by the defendant to the plaintiff for ſecuring an annuity and the warrant of attorney to confeſs judgment thereon, together with all ſubſequent proceedings on ſuch judgment, ſhould not be ſet aſide, and in the mean time all proceedings upon an ejectment brought on the demiſe of the plaintiff for the recovery of the premiſes belonging to the defendant on ſuch judgment be ſtayed.

It appeared from the affidavits that the memorial of the annuity, as required by the 17 *Geo.* 3. *c.* 26., ſtated the bond and warrant of attorney; the former of which, reciting that the defendant ſtood indebted to the plaintiff on three ſeveral notes under the hand of the defendant then payable, and bearing date reſpectively the 1ſt *January* 1790, for principal and intereſt the ſum of 365 *l.* 3 *s.* and that the plaintiff in conſideration of the ſaid ſum ſo due had contracted with the defendant for the purchaſe of an annuity of 60 *l.* a year during the plaintiff's life, and had on the ſame day delivered up the notes to be cancelled, was conditioned to pay the ſaid annuity by quarterly payments. It further appeared that the annuity, which was granted from the 26th *March* 1794, was paid up to the 26th *December* 1795; and there being one year's payment in arrear due the 26th *December* 1796, the plaintiff having firſt revived the judgment by ſuing out two ſcire facias', ſued out execution upon that judgment in *February* 1797, and levied thereon. And there being a further half year's annuity due, the plaintiff on 27th *June* 1797 ſued out an elegit, upon which an inquiſition was taken, and the jury having found the defendant to be poſſeſſed of certain freehold lands in *Middleſex*, an ejectment was brought upon the demiſe of the plaintiff to recover poſſeſſion of the moiety which was extended, which ſuit the defendant was let in to defend; and the plaintiff at the ſittings after laſt *Michaelmas* term obtained a verdict, on which he has ſince entered up final judgment. The objections to the annuity on which the rule was obtained were that the conſideration appeared to have been in notes, and not in money, as required by the 17 *Geo.* 3. *c.* 26. *ſ.* 3., and that at any rate thoſe notes ought to have been ſet forth with the conſideration upon which they iſſued.

WITHY *againſt* WOOLLEY.

Gibbs and *Marryat* ſhewed cauſe againſt the rule. Whatever objection there might have been to the grant of the annuity in the firſt inſtance the defendant has precluded himſelf by his laches from taking advantage of it now, when the matter has paſſed in rem judicatam, according to the rule laid down in *Buck* v. *Tyte* (*a*). For he might either have availed himſelf of any objection to the judgment confeſſed by pleading to the ſcire facias for reviving that judgment, or he might have defended the ejectment brought to recover the lands extended under the elegit upon the ſame ground, to which ejectment he made himſelf a party. But he comes now too late after verdict, upon which judgment has ſince been entered. But there is no objection to the annuity itſelf. The conſideration of it was the giving up of three notes of hand to a certain amount which is ſtated to have been the conſideration for the annuity; and that is ſufficient under the act of parliament. It was not neceſſary to ſet the notes out in the memorial; the account being ſettled between the parties there then exiſted a liquidated debt, which is a ſufficient money conſideration within the third clauſe of the act; for the word *money* in that clauſe is merely uſed in contradiſtinction to *goods*, which are in their nature of uncertain value. And this appears by reference to the fourth clauſe, which ſuppoſes that the conſideration may be in notes, and provides that if they ſhall not be paid the annuity may be avoided upon application to the Court. As far as any opinion was intimated by the Court upon this queſtion in *Shove* v. *Webb* (*b*), it is in favour of this conſtruction, though the Court there waved giving any expreſs opinion upon it.

Erſkine and *Wood* contrà were deſired by the Court to apply themſelves in the firſt inſtance to the previous objection. They contended that the act of parliament 17 *Geo.* 3. *c.* 26. was imperative on the Court, to whom an application like the preſent was made, to ſtay the proceedings upon ſuch an objection being ſhewn to them as was ſufficient to vacate the grant of the annuity according to the proviſions of the act. And that this was not like a common caſe depending upon the practice of the Court, which they had authority to regulate or diſpenſe with as beſt ſuited the ends of juſtice and the convenience of the ſuitors. The act itſelf does not ſpecify any particular time within which the application muſt be made; it is ſufficient if it be made at any time before execution executed, that is, while the proceedings

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(*a*) *Ante*, 495.

(*b*) *Ante*, 1 vol. 732.

may be ſtayed; and ſo far only does the authority of *Buck v. Tyte* extend. As to the proceedings on the two ſcire facias', which paſſed by ſurpriſe according to a practice not very commendable, the Court would not impute laches to the defendant for not coming in to defend himſelf then. (Lord *Kenyon* ſaid he laid no ſtreſs on that part of the caſe.) Then as to the ejectment, it is true the defendant might have raiſed the objection ſooner; but he did apply immediately after the verdict and before judgment, though that has been improperly ſigned pending this rule. And this being a remedial ſtatute, the Court will not hold parties to the ſame ſtrictneſs in point of time in making their objection in the firſt inſtance, as they do upon motions for ſetting aſide proceedings for mere irregularity. In the caſe of *Buck* v. *Tyte* the merits had once before been canvaſſed upon a ſummary application to the Court, though the particular objection had not then occurred; and the Court conſidered the matter as having paſſed in rem judicatam. Beſides no injury can accrue to the plaintiff from the objection not having been made before; becauſe the Court may ſet aſide the judgment upon the terms of the defendant's paying the coſts which have been unneceſſarily incurred by his neglect.

Lord KENYON C. J. No ſufficient anſwer has been given to the objection, which prevailed in the caſe of *Buck* v. *Tyte*, that this application ought to have been made ſooner. It is a caſe of conſiderable vexation to the plaintiff. The judgment by confeſſion in the firſt inſtance, which was by way of ſecurity, concludes nothing between the parties; ſo far they were acting together, and the defendant was afterwards at liberty to impeach the tranſaction. But as ſoon as the proceedings became adverſe, then the defendant ought to have made his ſtand. I do not mean to ſay that his not doing ſo then operates as a legal eſtoppel to him afterwards: but if unexplained it is a reaſonable ground for the Court to act upon in refuſing to entertain a ſummary juriſdiction upon his complaint. I am ready to admit the defendant's excuſe for not appearing to the ſcire facias' and conteſting the matter then. The practice of two ſcire facias' being equivalent to a ſcire feci is not ſo commendable as to hold a party bound by ſuch a proceeding in this caſe: but no reaſon has been aſſigned why the defendant did not make his ſtand upon the ejectment. It is enough to ſay that he has been guilty of great laches in not doing ſo, without exactly drawing the line how ſoon he ought to have applied to this Court. We ought not to ſuffer a party to go on in a courſe of fruitleſs litigation to the great expence and vexation of his opponent: but where there is an objection to the proceeding in limine, he ought to apply in a reaſonable time to ſtay the proceedings. The ground of our deciſion in this caſe is the acquieſcence of the defendant under a judicial proceeding. Our diſcretion ſhould be governed as much as poſſible in inſtances of this kind by analogy to proceedings in other caſes. The other queſtion which has been brought forward I leave untouched as to the rule which ought to be pronounced in this caſe; though the inclination of my opinion is that the legiſlature, in requiring that the conſideration of an annuity ſhould be in money only, meant *money* in contradiſtinction to *goods*, and that they conſidered any liquidated ſum due the ſame as monies numbered (*a*). However it will be ſufficient to conſider this queſtion when it comes in judgment.

ASHHURST J. and GROSE J. aſſenting,

Rule diſcharged.

(*a*) Vide *Kelſe* v. *Ambroſſe*, poſt.

The KING on the Proſecution of W. COATES *againſt* The WARDENS of the COOPERS COMPANY of NEWCASTLE UPON TYNE.

Wedneſday, May 2d.

A bye-law made by a company in a corporation to reſtrain the number of apprentices to be taken by any of the members is void. In a mandamus to a company to compel them to inrol indentures of apprenticeſhip, it is ſufficient to ſtate generally that thoſe who have ſerved a free burgeſs &c. under indentures of apprenticeſhip, and whoſe indentures have been inrolled, are entitled to be admitted to their freedom, that *A. B.* had ſerved &c, that his indentures ought to have been inrolled on being tendered &c, and that they were tendered for that purpoſe, but that the defendants refuſed to inrol them &c.

THIS caſe came before the Court on a return to a mandamus. The writ recited that the town of *Newcaſtle* was an ancient town, and the inhabitants and burgeſſes an immemorial corporation. That from time whereof &c. there have been divers ancient companies fellowſhips or fraternities of the freemen of the town. That from time whereof &c. every perſon who has ſerved an apprenticeſhip of ſeven years under indentures of apprenticeſhip to a free burgeſs of the town, ſuch free burgeſs being a free meeting brother and member of any of the companies &c, whoſe indentures of apprenticeſhip have been inrolled in the books of ſuch company, and who was not diſqualified by law from being made a freeman of the town, has been entitled and ought to be admitted a freeman or burgeſs of the town and to be a free meeting brother of the company. That the company of Coopers or Coopers Pulleymakers Turners and Ropemakers has been immemorially one of the ſaid companies. That one *J. Oxnard* on the 27th of *December* 1794 was by indentures bound apprentice to *W. Coates* (*Coates* then being a free burgeſs of the town and a free meeting brother and member of the ſaid company and duly entitled to take ſuch apprentice) for ſeven years; that the ſaid indentures ought upon being tendered to the wardens of the ſaid company to have been inrolled &c. and that the ſaid indentures were tendered by *Coates* to the defendants in order that they might be inrolled in the books of the ſaid company, but that the defendants refuſed &c. It then commanded the defendants to inroll the ſaid indentures &c.

To this writ of mandamus the defendants returned that the company of Coopers was from time immemorial until the making of the ordinance after mentioned an ancient company, and that the company of Pulleymakers Turners and Ropemakers was alſo from time immemorial until the ſaid ordinance another ancient company. That by an ordinance made in the 17th of *Eliz.* the mayor aldermen and ſheriff of the town (naming them,) being lawfully authoriſed ſo to do, ordained that the ſaid company of Coopers ſhould be a corporation; and as much as in them lay granted to the ſaid company power to make acts and lawful decrees for the well and quiet government of themſelves; and as much as in them lay alſo ordered that it ſhould be lawful for the ſaid company to receive accept and join to the ſame company the company of Pulleymakers Turners and Ropemakers, and to make one company for ever &c. That the ſaid mayor aldermen and ſheriff by the ſaid ordinance alſo ordered that “ none of the ſaid “ companies of Coopers Pulleymakers Turners or Ropemakers “ ſhould take any apprentice but one in four years (except ſuch “ apprentice ſhould die); and if any of the ſaid brethren having “ children of their own, then it ſhould be lawful to any free member or brother of the ſaid companies to take ſuch children and “ to put them or any of them to work with himſelf at all times “ as occaſion ſhould ſerve.” That that ordinance was duly accepted by the company of Coopers and alſo by the ſaid company of Pulleymakers &c, and the ſaid companies being joined together by virtue of the ſaid ordinance have from thence hitherto been one company. That by a bye-law of the ſaid company, made in *June* 1786 in purſuance of the ſaid ordinance, it was ordered “ that

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"that every brother for each apprentice he ſhould take after the firſt apprentice ſhould pay to the ſaid fellowſhip 10*l.*, provided ſuch apprentice ſhould be bound within the ſpace of four years from the time of ſuch firſt apprentice being bound, but if the ſecond apprentice ſhould not be bound until the firſt ſhould have ſerved four years, then the brother taking ſuch apprentice ſhould pay 5 *l.* only to the ſaid fellowſhip." That *W. Coates* on the 3d of *June* 1793 by indentures duly inrolled &c. took one *W. Wilſon* as an apprentice for ſeven years, who was living when *Oxnard* was ſo bound apprentice to *Coates* and alſo when *Oxnard*'s indentures were tendered to the defendants for inrolment. That when *Oxnard* was ſo bound *Wilſon* had not ſerved four years of his apprenticeſhip. And that *Coates* did not nor did any perſon on *Oxnard*'s behalf at the time of tendering *Oxnard*'s indentures pay the ſum of 10*l.* to the ſaid company in the bye-law mentioned. For which reaſons the defendants cannot inrol the ſaid indentures &c.

Chambre, for the proſecutor, took ſeveral objections to the return. Firſt, the bye-laws ſtated in the return are void; Secondly, if good, the defendants have not ſhewn that this is a caſe within the firſt bye-law made in the 17th *Eliz.* Firſt; the bye-laws are unreaſonable on the face of them, becauſe made in reſtraint of trade. They are alſo in derogation of the general law of the kingdom; for by the ſtat. 5 *Eliz. c.* 4. *ſ.* 30. it is enacted that it ſhall be lawful for any perſon exerciſing certain trades therein mentioned (of which that of a cooper is one) whereſoever he ſhall inhabit to receive the ſon of any perſon as an apprentice &c, albeit the father or mother of any ſuch apprentice have not any lands tenements or hereditaments &c. They alſo materially affect the conſtitution of the corporation of *Newcaſtle;* for it is ſtated in the mandamus that from time whereof the memory of man is not to the contrary every perſon who has ſerved an apprenticeſhip of ſeven years under indentures to a free burgeſs of the town, ſuch free burgeſs being a member of any of the companies, is entitled to the freedom of the corporation. So that theſe bye-laws are an infringement on the freedom of the corporation. The laſt bye-law is alſo againſt the ſtat. 22 *Hen.* 8. *c.* 4., which enacts that no maſter wardens or fellowſhip of crafts &c. ſhall take of any apprentice or of any other perſon or perſons for the entry of any apprentice into their fellowſhip above the ſum of 2 *s.* 6 *d.:* whereas this bye-law requires the ſum of 10 *l.* to be paid if the maſter had within four years before the taking of an apprentice taken any other apprentice, or 5 *l.* if the ſecond apprentice be taken after four years from the time of the maſter taking the firſt apprentice. Beſides, even if the laſt bye-law were good, it affords no reaſon for refuſing to inrol the indentures; becauſe that would be to puniſh the apprentice for the default of the maſter. Though the maſter may be liable to pay the penalty of 10 *l.*, yet the apprentice is entitled to have his indentures inrolled. Secondly; ſuppoſing the corporation had authority to make the ordinance in the 17th *Eliz.*, it does not appear that this caſe comes within it. By that it is ordained that none of the companies of Coopers &c. ſhould take any apprentice but one in four years; and if any of the brethren have children of their own then it ſhould be lawful to any of the ſaid companies to take ſuch children &c. Now it is not ſtated in the return that *Oxnard* was not a ſon of one of the freemen; and if he were, he comes within the exception. The return therefore ſhould have negatived his coming within this exception. In *R.* v. *The Mayor* &c. *of Abingdon* (*a*) the Chief Juſtice ſaid "The law requires the moſt exact certainty in theſe caſes, becauſe the party cannot traverſe or interplead; and it is not enough to offer a matter ſo that the party may be able to falſify it in an action, but the matter muſt be ſo alleged that the Court may be able to judge of it and determine whether it be a ſufficient cauſe or not." A return to a mandamus muſt be preciſe and certain to every intent, becauſe in this mode of proceeding the proſecutor has no opportunity of replying as he has in a plea in bar.

Marryat contrà. Firſt; the bye-law made in *June* 1786 is neither unreaſonable nor againſt the ſtat. 22 *Hen.* 8. It is a mere regulation of the trade, and is founded on the ordinance by which the company itſelf was conſtituted, and to which therefore none of the members of the company can be permitted to object. By that ordinance, which is binding on all the members of the company, becauſe the company itſelf was incorporated by it, no maſter could take a ſecond apprentice within four years after taking the firſt, unleſs the ſecond apprentice were the ſon of a freeman: but this bye-law is more favorable to the trade, becauſe it enables the maſter to take a ſecond apprentice within that period on payment of a ſum of money. And the ſtat. 22 *Hen.* 8. was made with a different view; it merely prevents the taking of a

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(*a*) *Salk.* 432.

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larger fee than that mentioned in the act for making the entry of inrolment, as a fee of office: but this bye-law was made to benefit the company of which this perſon wiſhes to become a member. But even if the bye-law made in 1786 be void, ſtill the proſecutor is not entitled to a peremptory mandamus, for then the ordinance made in the 17th *Eliz.* remains in force; and *Oxnard*, having been taken as an apprentice within four years after *Wilſon*'s apprenticeſhip, is not a legal apprentice, ſince that ordinance abſolutely prohibits the maſter taking a ſecond apprentice within four years, except in certain caſes, of which claſs this is not one. This therefore is a claim contrary to the original conſtitution of that company of which he ſeeks to become a member. But, ſecondly, whatever judgment the Court might form on the return to this mandamus, the writ itſelf is defective in ſeveral particulars. It is too general, in not ſtating how the obligation on the wardens of this company to inrol the indentures of apprenticeſhip ariſes. It merely alleges that they ought to inrol the indentures, without ſhewing how that duty ariſes. Nor does it ſtate that there is any ſuch lawful officer of the company as a free-meeting brother.

Chambre in reply. There is a fallacy in ſaying that the company was conſtituted by the ordinance made in the reign of *Elizabeth*; for it appears by the writ that the companies, though conſolidated by that ordinance, have exiſted immemorially; and therefore it does not follow, becauſe the proſecutor objects to the bye-law made in 1786 or to the ordinance made in the 17th *Eliz.*, that he objects to the conſtitution of the company itſelf. No anſwer whatever has been given to the ſecond objection, that the exception in the ordinance is not negatived in the return. With regard to the objection taken to the writ, it may be obſerved that writs of mandamus to admit a perſon into a corporation or to inrol indentures of apprenticeſhip are always drawn in general terms like the preſent; and therefore the form of this writ is warranted by univerſal practice.

Lord KENYON, Ch. J. I believe that this writ is drawn in the uſual form, and I ſee no objection to it. If the defendants could have returned any reaſon to ſhew that this party is not entitled to have the indentures inrolled, they ſhould have ſhewn it. But this return is bad from the beginning to the end. To one objection the defendants' counſel has not even attempted to give any anſwer, namely, that it is not alleged that the apprentice was not the

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the ſon of a freeman. Theſe two companies have exiſted immemorially; but how they could be conſolidated together I cannot conjecture: however as they have aſſumed that character, we are to take it as againſt themſelves that they are conſolidated. There is a caſe in *Salkeld* (*a*), where it is ſaid that a corporation may make a fraternity: but no notice is taken of that point in the other (*b*) reports of that caſe; and I cannot conceive that they have ſuch a power; it can only be effected by the Legiſlature or by the Crown. Here however it is ſufficient to ſay that theſe defendants have aſſumed that character and are now bound by it. But when the corporation of *Newcaſtle* choſe to conſolidate theſe two companies, they certainly had no right to ſuperadd bye-laws in reſtraint of trade; and a prohibition not to take more than a certain number of apprentices is a bye-law in reſtraint of trade. Bye-laws have been ſeveral times brought to me, as Chief Juſtice, for confirmation under the ſtatute; and not long ago I refuſed to allow ſome, becauſe I thought them illegal in reſtraining maſters from taking beyond a certain number of apprentices. On the act of parliament alſo I think the laſt bye-law is void: that ſtatute ſays that only a ſmall ſum, 2*s.* 6*d.*, ſhall be taken for the inrolment of indentures of apprenticeſhip, whereas the defendants inſiſt that under this bye-law 10*l.* ſhall be taken for it. But even if the company had a right to demand that ſum of the maſter, that is no reaſon why the indentures ſhould not be inrolled. If they think they can ſupport this bye-law, they may ſtill bring their action againſt the maſter to recover the penalty. But I am clearly of opinion that this return cannot be ſupported, and that a peremptory mandamus ought to go.

Ashhurst, J. Even if theſe companies were properly conſtituted, and had a power to make bye-laws, which queſtions it is unneceſſary to diſcuſs in this caſe, the bye-laws are clearly bad, as being made in reſtraint of trade.

Grose, J. This mandamus is drawn in the uſual form. The defendants do not controvert any of the facts ſtated in the writ, but they rely on certain pretended bye-laws. Now without enquiring whether one corporation can make another, or whether theſe bye-laws are good, it is clear that this apprentice is not brought within the laſt of them. That ſays that *every brother* for each apprentice he ſhould take ſhould pay 10 *l.* &c.; the mean-

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(*a*) Vid. *Cuddon* v. *Eaſtwick*, *Salk.* 192.

(*b*) Vid. 6 *Mod.* 123.; *Holt's Rep.* 433.

ing of which evidently is that the brother ſhall pay that ſum: but this is not an application by a brother but by an apprentice. But the bye-law does not ſay that the indentures of apprenticeſhip ſhall not be inrolled unleſs the money be paid. Therefore on this ſhort ground I am of opinion that the return is bad.

LAWRENCE, J. I alſo think that this writ is in the uſual form. As to the argument of the defendants that the party applying to be admitted into this company ought not to be permitted to make the firſt objection to the return becauſe it is contrary to the conſtitution of the corporation, that conſequence by no means follows; for even though the corporation of *Newcaſtle* could make an ordinance for the purpoſe of uniting theſe two companies, it does not follow that they could make a bye-law in reſtraint of trade: that ordinance might be good in part though the reſt were bad.

Return quaſhed.

Wedneſday, May 2d.

The KING *againſt* THOMAS SKINGLE.

A leſſee of lands ſhould be rated to the poor according to the preſent value of the lands.

THIS came before the court on a caſe reſerved from the quarter ſeſſions of the county of *Eſſex*.

T. Skingle appealed againſt a rate made for the relief of the poor of the pariſh of *Stebbing*, in which *William Hill* was rated at 180*l.* for a meſſuage farm and lands called *Porters Hall* containing 386 acres held by leaſe granted by the earl of *Eſſex* commencing at *Michaelmas* 1779 and expiring at *Michaelmas* 1800, at the rent of 180*l.* under the uſual covenants; and which ſaid rent was the annual value of the farm at the commencement of the ſaid leaſe; *William Hill* was alſo therein rated at 7*l.* per annum for certain lands called *Brewſters*, held under the ſame leaſe at a ſeparate rent of 7*l.* In the ſaid rate *John Bull* was rated at 110*l.* for a meſſuage and lands called *White Houſe*, containing 300 acres held under a like leaſe granted by the ſaid earl commencing at *Michaelmas* 1780 and which will expire at *Michaelmas* 1801, at the rent of 110*l.* The ground of the appeal was that *William Hill* and *John Bull* were under-rated for the farm and lands in their occupations; and the appellant offered evidence to the court to prove that the ſaid farms and lands are now of greater annual value than the rents reſerved by the ſaid leaſes; but as the farms were of no greater annual value at the commencement of the leaſe

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than the reſerved rents, and no fine or premium having been paid, nor any other rent or conſideration paid than the rents reſerved by the leaſes aforeſaid reſpectively, the court of quarter ſeſſions were of opinion that the rents reſerved by the leaſes were concluſive evidence of the value of the ſaid farms and lands, and rejected the evidence tendered by the appellant; and they confirmed the rate ſubject to the opinion of this Court.

Trower, who was to have argued in ſupport of the order of ſeſſions, upon a queſtion put by the Court, admitted that the evidence offered ought to have been received, and that the order could not be ſupported.

The Court ſaid that the caſe was too clear for argument, and directed that

The Rule for quaſhing the order of ſeſſions be made abſolute.

Mingay, *Greenwood*, and *Pooley*, were to have argued againſt the order of ſeſſions.

Thurſday, May 3d.

Woolley *againſt* Thomas.

Affidavit to hold to bail in trover, ſtating that "the plaintiff's cauſe of action againſt the defendant was for converting and diſpoſing of divers goods of the plaintiff of the value of 250*l.*, which he refuſed to deliver tho' the plaintiff had demanded the ſame, and that neither the defendant or any perſon on his behalf had offered to pay to the plaintiff the 250*l.* or the value of the goods," was holden to be inſufficient.

The defendant having been holden to bail on an affidavit made by the plaintiff, ſtating that "his cauſe of action againſt the defendant was for converting and diſpoſing of divers goods and chattels of the plaintiff of the value of 250*l.* and upwards, which he refuſed to deliver though the plaintiff had demanded the ſame, and that neither he (the defendant) nor any perſon on his behalf had offered to pay to the plaintiff the ſaid ſum of 250*l.* or the value of the ſaid goods;"

Jervis obtained a rule on a former day, calling on the plaintiff to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody on filing common bail, and why the bail-bond ſhould not be delivered up to be cancelled, on account of the inſufficiency of the affidavit, in not ſtating that the defendant ever had poſſeſſion of the goods in queſtion, or that he had ever converted them to his own uſe, or that the plaintiff had any cauſe of action againſt the defendant.

Lawes, who now ſhewed cauſe againſt that rule, obſerved that, though the affidavit was not critically accurate in ſtating that the defendant converted the goods to his own uſe, that charge was in ſubſtance imputed to the defendant by theſe words "The plaintiff's cauſe of action againſt the defendant is for converting and diſpoſing" &c. And he cited the caſe of *Charter* v. *Jaques* (*a*), where an affidavit to hold to bail, ſtating "that the defendants had poſſeſſed themſelves of divers goods belonging to the plaintiff and had refuſed to deliver them up, and that they or ſome of them had converted and diſpoſed of them to their own uſe," was holden to be ſufficient.

But *The Court* ſaid that the affidavit in queſtion was not in the uſual form, and did not poſitively ſtate any cauſe of action againſt the defendant. That in the caſe cited it was alleged that the defendants were poſſeſſed; whereas here, though the defendant refuſed to deliver up the goods, it did not appear that they were ever in his poſſeſſion. They therefore made the

Rule abſolute.

(*a*) *Cowp.* 529.

Kelfe *againſt* Ambrosse, Clerk.

Thurſday, May 3d.

Money lent and paid at different times for the education and advancement of the defendant is a good conſideration for the grant of an annuity within the 17 *Geo.* 3. *c.* 26. *ſ.* 3. Such a conſideration is ſufficiently expreſſed in the deeds for ſecuring the annuity under the deſcription of "money lent and advanced and alſo paid laid out and expended to and for the maintenance education and advancement in the world of the defendant."

Upon a rule to ſhew cauſe why the bond and warrant of attorney to confeſs judgment thereon and the deed of covenant for ſecuring an annuity ſhould not be delivered up to be cancelled, and why the judgment confeſſed and all proceedings thereon ſhould not be ſet aſide; it appeared that the conſideration for granting the annuity of 100*l.* per annum during the defendant's life, ſecured upon a living which he held, as appears by the recital in the deeds referred to, was "that the defendant on the 4th *April* 1797, (the day on which the ſeveral inſtruments bore date were executed) ſtood juſtly and truly indebted to the plaintiff, in right of *Henrietta* the plaintiff's wife, in 1400*l.* for ſo much money by the ſaid *Henrietta* before her intermarriage with the plaintiff lent and advanced, and alſo paid laid out and expended, to and for the maintenance education and advancement in the world of him the defendant, and which the defendant is thereby ſtated to admit." The affidavit of the defendant charged that the conſideration above ſet forth is not really truly or bonâ fide ſet forth, nor is the conſideration which is ſet forth in the above deeds the real and true conſideration for which he entered into the ſame.

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Kelfe *againſt* **Ambrosse.**

The affidavits in anſwer on the part of the plaintiff ſtated that the defendant, who was nephew to the plaintiff's wife, having no property of his own, and the plaintiff's wife being deſirous of ſerving him, ſhe before her marriage laid out and expended for him and lent him various ſums of money to the amount of 1900 *l.* for his maintenance education and advancement in the world, and that the 1400 *l.* ſecured by the bond and other inſtruments, which was the conſideration for the annuity, was part of the ſaid 1900 *l.*; and that when the deeds were preparing the defendant acknowledged to the attorney who was inſtructed to prepare them that the conſideration therein ſtated was juſt and true.

Two grounds of objection were made in ſupport of the rule; 1ſt, That the conſiderations ſtated are not ſufficient to ſupport the grant of the annuity within the proviſions of the 17 *Geo.* 3. *c.* 26. 2dly, That if they are, they are not truly or fully ſet forth in the deeds, and conſequently the annuity is void by that ſtatute.

Gibbs and *Marryat* ſhewed cauſe againſt the rule. As to the firſt objection, the 3d clauſe of the annuity act, which ſtates that the conſideration for any annuity ſhall be *in money only*, has always been taken to mean *money* in contradiſtinction to *goods*. It need not be in monies numbered at the time of granting the annuity. This has always been ſo conſidered in caſes on the annuity act, in many of which the ſame objection would have applied if it had been thought of any weight. In the caſe ex parte *Fallon and Wiſe* (*a*), part of the conſideration ſtated was money paid by the grantee at the deſire of the grantors to another perſon to redeem a former annuity granted by them, which was holden to be ſufficient within the meaning of the act; and the diſtinction above alluded to between money and goods was taken. And this appears to be the true conſtruction from the 4th clauſe of the act, which is framed upon the preſumption that a conſideration in notes payable at a future day would be good, and therefore provides that if they are not paid the annuity ſhall be void. As to the 2d objection; it would be impoſſible in a caſe like the preſent to ſpecify each particular ſum which was advanced for the uſe of the defendant or the times when advanced; it is enough that when the annuity was granted there was a certain liquidated debt. Here it appears that the ſecurity was taken for leſs than the real debt, and that the conſideration ſtated is 1400 *l.* "lent

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(*a*) *Ante*, 5 vol. 283.

and advanced and paid to the uſe of the defendant;" all which was admitted by him. It is alſo obſervable that though the defendant ſays that the conſideration as ſet forth in the deeds was not the real conſideration for granting the annuity, he does not pretend to ſuggeſt any other.

Lockhart contrà. 1ſt, The act of parliament is poſitive that the conſideration for granting an annuity muſt be in money only; and the proviſion in the 4th clauſe reſpecting the conſideration being in notes is the only excepted caſe provided for. In the caſe ex parte *Fallon* the tranſaction was entire, and the money which was paid for redeeming the prior annuity was conſidered as paid to the grantors; and ſo in effect it was. But 2dly, admitting the education and advancement of a perſon to be a good money conſideration for an annuity within the act, ſtill the ſeveral ſums advanced ſhould have been explicitly ſet forth and the times when advanced, otherwiſe the object of the act may be defeated. If the names of the perſons to whom the ſeveral ſums are ſuppoſed to have been paid had been ſtated, recourſe might have been had to thoſe perſons to know the truth of the caſe. In the caſe ex parte *Fallon* the whole tranſaction was ſet forth in the deeds. So in the caſe of the Duke of *Bolton* v. *Williams* (*a*) the Lord Chancellor ſaid that the whole res geſta is to be ſet forth, and that the actual mode of payment is to be ſtated.

Lord KENYON, Ch. J. If there had been any doubt whether the conſideration money had or had not been paid, we would have directed an iſſue to try that fact: but it appears beyond all doubt that money has been advanced by the plaintiff's wife to the uſe of the defendant to a larger amount than the ſum ſtated as the conſideration of granting this annuity. Whether we conſider the words of the act of parliament or the decided caſes, I think there is no weight in either of the objections taken to this annuity. In the caſe ex parte *Fallon* we laid down a rule, which has ſince been adopted in the court of Common Pleas, that the conſideration money of an annuity need not be paid down in monies numbered at the time. In that caſe we ſaid that one great object of the Legiſlature, in paſſing the act, was to prevent goods being forced on neceſſitous perſons inſtead of money at a price much beyond their real value: but the Legiſlature did not intend to prohibit a debtor granting an annuity for a debt fairly and honeſtly con-

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(*a*) 4 *Bro. Ch. Caſ.* 309.

tracted which the debtor perhaps may have no means of paying but by granting an annuity. In the preſent caſe it appears that the annuity was granted for the beſt of conſiderations; the defendant not having the means of educating himſelf, but being deſirous of being placed in a ſituation in which he might gain an honorable livelihood, applied to the plaintiff's wife to advance money for the purpoſe of his education, ſhe advanced 1900 *l.* for that purpoſe at different times, and afterwards conſented to take an annuity as for a conſideration of 1400 *l.* only; and when the defendant gave inſtructions for the annuity deeds he admitted that all this money had been advanced for him. Notwithſtanding all this it is now made a ſerious queſtion in a court of law whether theſe deeds are a good ſecurity for the annuity; I think it would be a reproach to the adminiſtration of juſtice to put a conſtruction on this act of parliament ſo contrary to the intention of the Legiſlature as well as to common honeſty. In my opinion the tranſaction is fairly ſtated in the memorial, and therefore the rule muſt be diſcharged with coſts.

ASHHURST, J. This act of parliament was made for the protection of neceſſitous perſons, but it was never meant to extend to an annuity granted for a fair and honeſt conſideration. The Legiſlature only intended to prohibit the granting of annuities in conſideration of goods ſold at an advanced price inſtead of money: but where an annuity is granted for a money conſideration, it is not neceſſary that the money ſhould be paid down at the inſtant. And I am glad to find this opinion ſanctioned by authority.

GROSE, J. There are two queſtions in this caſe, one whether an antecedent debt be a good conſideration for granting an annuity, the other if it be whether that conſideration be ſufficiently ſet forth in the deeds. As to the firſt; that an antecedent debt may be a good conſideration for an annuity is clear from the caſes of *Shove* v. *Webb* (*a*) and ex parte *Fallon*, in the latter of which Mr. J. *Buller* ſaid "This cannot be diſtinguiſhed from the caſe of a debt for ſo much money actually borrowed of the grantee by the grantor." With regard to the ſecond queſtion; the objection is that it ſhould have been ſet forth when the different ſums of money were paid, to ſupport which caſes have been alluded to in which it was ruled that the names of the perſons *by whom* the conſideration money was paid: but what was determined in the latter claſs of caſes ought not to be applied to ſuch a

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(*a*) *Ante*, 1 vol. 732.

caſe as the preſent where the grantor himſelf admitted that the conſideration was an antecedent debt due from him to the grantee ariſing from different ſums paid at different times for his uſe. It would be extending the act of parliament too far to decide that this annuity could not be ſupported merely becauſe the reſpective times when theſe different ſums of money were advanced by the grantee are not mentioned; every thing that paſſed at the time of granting the annuity is ſufficiently ſet forth.

Lawrence J. This is not like the caſe where for the purpoſe of granting an annuity goods are ſold in order to create a debt which may be ſet up as the conſideration of the annuity. Here different ſums had been fairly and bonâ fide paid by the grantee for the grantor without any view to an annuity; thoſe ſums created a debt in the grantor, which has fairly been ſtated as the conſideration of granting this annuity; this therefore was a money conſideration. And I think there is no weight in the other objection.

Rule diſcharged with coſts.

Wilkinson *againſt* South.

Friday, May 4th.

Under a bequeſt of a term of years "to *A.* and the heirs of his body and to their heirs and aſſigns for ever, but in default of ſuch iſſue then after his deceaſe to *B.* and his heirs," the limitation over to *B.* is good by way of executory deviſe.

The following caſe was ſent by the Maſter of the Rolls for the opinion of this Court.

E. Parker, the teſtator, being poſſeſſed of a leaſehold meſſuage or tenement in *Little George Street Weſtminſter* for the reſidue of a term of years which is not yet expired, by will dated the 9th of *September* 1778, gave and bequeathed the ſame "to his wife *Mary Parker* during the term of her natural life, and after her deceaſe to go to his ſon *S. Parker* and to the heirs of his body lawfully begotten and to their heirs and aſſigns for ever, *but in default of ſuch iſſue then after his deceaſe* to go to his (the teſtor's) grandſon *T. Wilkinſon* (the plaintiff) his heirs and aſſigns for ever." The teſtator died without revoking his will, leaving the ſaid *S. Parker* him ſurviving: but *Mary Parker* died in his lifetime. *Samuel Parker* after the deceaſe of the teſtator entered on the ſaid leaſehold eſtate under the ſaid bequeſt, and is dead without ever having had any iſſue of his body. The queſtion for the opinion of the Court is, Whether the ſaid *T. Wilkinſon* is intitled under the ſaid will to any and what intereſt in the ſaid leaſehold premiſes?

Bayley for the plaintiff. The queſtion in this caſe is, Whether the limitation to the plaintiff be or be not too remote? which depends on this queſtion, Whether that limitation was only to take effect after a general failure of iſſue of *S. Parker* and the heirs of his body, or was to take effect on *S. Parker*'s dying without leaving iſſue at the time of his death? If the latter, then it is not too remote, and the plaintiff is entitled to the judgment of the Court. The intent of the teſtator was that *S. Parker* ſhould take a life eſtate, with a contingent limitation of the abſolute intereſt to the heirs of his body if any, but if he died without leaving any iſſue at the time of his death then that it ſhould go over to the plaintiff. In caſes of this kind the courts have always been anxious to reſtrain the operation of the words "dying without iſſue" to "dying without leaving iſſue at the time of the death of the firſt taker." *Pinbury* v. *Elkin*, 1 *P. Wms.* 565; and Lord *G. Beauclerk* v. *Dormer*, 2 *Atk.* 311. In the former of thoſe caſes Lord C. *Parker* ſaid the words "die without iſſue" are relative to the death of the party, that being the natural meaning of thoſe words, and that the words "then after" meant "immediately after." In the latter Lord *Hardwicke* ſaid the words "then after her deceaſe" were equivalent to "at her deceaſe." What was done in *Paine* v. *Stratton*, 3 *Bro. P. C.* 257, cited in *Read* v. *Snell*, 2 *Atk.* 647. is alſo a ſtrong confirmation of this doctrine.

Adam contrà. It is a general rule that where there is a beqeuſt of a term of years, which if it were a freehold would give an eſtate tail, it gives the abſolute intereſt in the term to the firſt taker. Now in this caſe there are words ſufficient to give an eſtate tail to the firſt taker, and this by expreſs words and not merely by implication, in which latter caſe indeed the above rule does not apply. *Atkinſon* v. *Hutchinſon*, 3 *P. Wms.* 258. In the preſent caſe there is nothing to ſhew the teſtator's intention to reſtrain the operation of the words to a "dying without leaving iſſue at the death of *S. Parker*;" and in *Saltern* v. *Saltern* (*a*) Lord *Hardwicke*, in anſwer to an argument that a deviſe to a man for life of a chattel intereſt and if he die without iſſue, or if he die without heirs of his body, remainder over, ſhall be conſtrued to mean a dying without iſſue at the time of his death, ſaid "I know of no ſuch rule; for in thoſe caſes where the Court has reſtrained it to a dying without iſſue at the time of the death

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(*a*) 2 *Atk.* 376.

death of the firſt taker, it has ariſen from ſome other words which ſhew the intention of the teſtator to confine it to ſuch a dying without iſſue." This is diſtinguiſhable from the caſe of *Pinbury* v. *Elkin*, where the limitation was "if ſhe ſhall die without iſſue by the ſaid teſtator *then after her deceaſe*" &c: whereas here it is "to *S. Parker* and the heirs of his body *and to their heirs and aſſigns for ever, but in default of ſuch iſſue then after his deceaſe* to go to his (the teſtator's) grandſon;" and the words "after his deceaſe" do not mean "after the deceaſe of *the firſt taker*," but after the ſubſequent limitation of the eſtate, which is the next antecedent.

Lord KENYON Ch. J. We will ſend our certificate in this caſe, but I will now ſtate the ſhort ground on which my opinion is founded. The only queſtion is, Whether on the fair conſtruction of the words of this will the teſtator meant that the limitation over to *T. Wilkinſon*, the plaintiff, ſhould only take effect after an indefinite failure of iſſue of *S. Parker* or on a failure of iſſue living at the time of the death of *S. Parker*; for as ſoon as that intention is diſcovered, there is an end of the caſe. If perſonal property be ſo limited that, if it were an eſtate of inheritance, it would give an eſtate tail, the abſolute intereſt veſts in the firſt taker. But if the limitation be with a double aſpect to *A.* and to the iſſue of his body if there be any ſuch iſſue living at his death, if not then over, it is a good limitation. It was ſo ſettled in *Sabbarton* v. *Sabbarton* (*a*) and a variety of other caſes, ſome of which are not in print. Here the words of the will are "to *S. Parker* and the heirs of his body and to their heirs and aſſigns for ever:" if thoſe words ſtood uncontrolled by any thing ſubſequent in the will, the abſolute intereſt would have veſted in him: but other words are added "but in default of ſuch iſſue *then after his deceaſe* to go to the teſtator's grandſon." There is a caſe in the books to ſhew that *then* and *when* are adverbs of time. Then at what time was the eſtate to go over to the teſtator's grandſon? At the death of *S. Parker* if he left no iſſue; there is nothing in the will to ſhew that the teſtator intended that the limitation over ſhould not take effect until future generations, but on the contrary there is ſufficient to ſhew that he intended that the eſtate ſhould in one event veſt in the grandſon at the time of *S. Parker*'s death, and that is within the time which the law

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(*a*) *Caſ. Temp. Talb.* 55. 245.

allows in the caſe of executory deviſes. The rule reſpecting executory deviſes is extremely well ſettled; and a limitation by way of executory deviſe is good if it may take place after a life or lives in being and within twenty-one years and the fraction of another year afterwards. As I before obſerved this is a queſtion of intention; and I am clearly of opinion that the teſtator's intention was that if *S. Parker* did not leave any iſſue at his death the ſubſequent limitation ſhould take effect (*a*).

The following certificate was afterwards ſent in this caſe; "We have heard this caſe argued by counſel, and are of opinion that *T. Wilkinſon* is entitled under the will of *E. Parker* to the abſolute and entire intereſt in the leaſehold premiſes above mentioned.

KENYON.
May 9th, 1798. W. H. ASHHURST.
N. GROSE.
S. LAWRENCE."

(*a*) *Roe* d. *Sheers* v. *Jeffery*, poſt.

Saturday, May 5th.

The KING *againſt* The Inhabitants of LEDBURY.

An order for reimburſement under the 33 *Geo.* 3. *c.* 8. *ſ.* 3. made upon the pariſh for which a ſubſtitute in the militia ſerves to indemnify the pariſh in which ſuch ſubſtitute's family ſhall have become chargeable and been relieved under an order of maintenance muſt be made by the ſame magiſtrate and at the ſame time as the firſt order of maintenance; and notice of ſuch order of reimburſement ought to be ſerved upon the pariſh to be affected by it before they can be proceeded againſt criminally for diſobedience to it.

Semble, that if the ſubſtitute be ſworn and actually ſerve, his family are entitled to be relieved within the meaning of the 26 *Geo* 3. *c.* 107. *ſ.* 24. and 33 *Geo.* 3. *c.* 8. *ſ.* 3. though the ſubſtitute were not previouſly approved by two deputy-lieutenants or inrolled.

UPON a certiorari removing certain proceedings after mentioned into this Court a rule was granted to ſhew cauſe why an order of ſeſſions quaſhing an original order made by *Michael Bowles*, clerk, a juſtice of the peace for the county of *Hereford*, directing the overſeers of the poor of the pariſh of *Stoke Prior* in the ſaid county to reimburſe the ſum of 26 *l.* 6 *s.* to the overſeers of the poor of the pariſh of *Ledbury* in the ſaid county, and alſo quaſhing a record of conviction grounded on the ſaid original order, ſhould not be quaſhed, and the original order and record of conviction affirmed.

The following orders and documents referred to in the caſe hereafter ſtated were removed here by the certiorari.

(Marked A) County of *Hereford*.—To the overſeers of the poor of the pariſh of *Ledbury* in the ſaid county.—Whereas complaint

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upon oath hath been made unto me *Richard Cocks* eſq. one of his Majeſty's juſtices of the peace in and for the ſaid county by *Mary Brown* now dwelling in your ſaid pariſh, wife of *Richard Brown* a private militiaman, ſerving in the *Herefordſhire* regiment of militia as a ſubſtitute for *Thomas Eckley* of the pariſh of *Stoke Prior* in the ſaid county, which militia are now embodied and in actual ſervice, and have been ordered to march; and that ſhe the ſaid *Mary Brown* is not able to ſupport herſelf and child, namely, *Edward Brown* aged about one month; I do therefore hereby require you the ſaid overſeers (&c.) to pay unto the ſaid *Mary Brown* the ſum of four ſhillings weekly for the ſupport of her and her ſaid child until you ſhall be otherwiſe ordered to forbear the ſaid allowance; which ſaid weekly ſum is to be reimburſed to you by the ſaid overſeers of the poor of the pariſh of *Stoke Prior* aforeſaid, *who are hereby required to reimburſe the ſame* accordingly; dated 10th *Feb.* 1793; ſigned and ſealed by *Richard Cocks*.

(Another marked C) containing an account wherein the overſeers of the pariſh of *Stoke Prior* are made debtors to the overſeers of *Ledbury* in the ſum of 26*l.* 6*s.* for various ſums paid by the latter to the ſaid *Mary Brown* for herſelf and child from the year 1793 to 1797; to which account, verified on oath before *M. Bowles* a magiſtrate, is ſubjoined the following order of reimburſement;

"I allow and order the overſeers of the poor of the pariſh of *Stoke Prior* to reimburſe the ſaid ſum of 26*l.* 6*s.* to the overſeers of the poor of the pariſh of *Ledbury* aforeſaid;" dated 29th *November* 1797, and ſigned *M. Bowles*.

(Another marked D.) This was a conviction before the ſame *M. Powles* of one of the overſeers of *Stoke Prior* in the ſum of 5*l.* for refuſing to pay 26*l.* 6*s.* to the overſeers of *Ledbury*, which they had advanced to *Mary Brown* &c.

The caſe, which accompanied theſe documents and was alſo returned to the certiorari, then ſtated that *T. Eckley*, a pariſhioner of *Wickton* in the pariſh of *Stoke Prior* in the county of *Hereford*, on the 24th of *Auguſt* 1792 was drawn by ballot to ſerve in the militia of the ſaid county, and ſerved in the ſame as a ballotted man till the 7th of *February* 1793, when the regiment being then and ſtill continuing embodied and called out into actual ſervice *Eckley* engaged one *E. Brown* of *Ledbury* to ſerve in the militia as a ſubſtitute for him, who was ſworn in on the ſame day

day to ſerve as ſuch ſubſtitute at *Hereford* before one deputy-lieutenant, who was alſo commanding officer of the regiment at the time; but *Brown* was never approved by two deputy-lieutenants, nor enrolled by the ſubdiviſion clerk or the clerk of the general meetings; nor was any certificate or notice of his having taken ſuch oath tranſmitted to either of the ſaid clerks. Immediately after *Brown* was ſo ſworn in he joined the regiment, was entered upon the muſter roll, and was regularly muſtered and exerciſed, and continued ſerving in the ſaid regiment during the whole of *Eckley*'s time, which expired in *Auguſt* laſt, and is now ſerving in the ſaid regiment till the end of the war. *Eckley* as ſoon as *Brown* had taken the ſaid oath before the ſaid deputy-lieutenant received his diſcharge, and has from that time reſided in *Stoke Prior*. On the 8th of *February* 1793 the wife of *Brown* applied to the overſeers of *Ledbury* for relief of herſelf and child about three years old, and produced the certificate of the ſerjeant of the *Hereford* regiment that her huſband was then ſerving as the ſubſtitute for *Eckley*; upon which the overſeers took her before Mr. *Cocks* a magiſtrate for the county of *Hereford*, who ordered the overſeers of *Ledbury* to pay to *Brown*'s wife four ſhillings weekly, for the maintenance of herſelf and her child, (vide letter A), but no ſummons was iſſued by the magiſtrate to the officers of *Stoke Prior* to ſhew cauſe why the order on *Ledbury* ſhould not be made, nor did the pariſh of *Stoke Prior* receive any notice of the original order of relief till the 1ſt *June* 1797, when they were informed that if they did not pay the ſaid money an order of reimburſement would be made. The parties met in conſequence of that information, but nothing being ſettled then, the pariſh officers of *Ledbury* on the 27th of *October* 1797 received a letter from the officers of *Stoke Prior*, declining to pay the money, and giving notice of their intention to appeal againſt any order that might be made to enforce payment. In conſequence of the order marked A the overſeers of *Ledbury* regularly paid to *Brown*'s wife the weekly ſums ordered to be paid from the 8th of *February* 1793 to the 27th of *November* 1797, amounting to 26*l.* 6*s.* On the 29th of *November* 1797 the overſeers of *Ledbury* applied to the Rev. *M. Bowles* a magiſtrate for an order on *Stoke Prior* to reimburſe the officers of *Ledbury* the ſaid ſum of 26*l.* 6*s.* (but no previous ſummons appeared to have been iſſued to the officers of *Stoke Prior* to ſhew cauſe againſt the ſaid order), which ſaid magiſtrate after taking the affidavits of

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of the officers as to the expenditure of the ſaid ſum of 26 *l.* 6 *s.* made an order on the 29th of *November* 1797 (marked C) to the overſeers of *Stoke Prior* to reimburſe the ſame to the overſeers of *Ledbury*, a copy of which order was ſerved on *Henry Caſwell* one of the overſeers of *Stoke Prior* on the 30th of *November* 1797, which he then refuſed to pay. In conſequence of this refuſal he was ſummoned to appear before *M. Bowles* on the 5th *December* laſt to ſhew cauſe why he ſhould not pay the penalty of 5 *l.* under the ſtatute 34 *Geo.* 3. *c.* 47. *ſ.* 3. On the ſame day he perſonally appeared in purſuance of ſuch ſummons before *M. Bowles*, but ſhewing no ſufficient cauſe he was convicted in the ſum of 5 *l.*, which ſaid ſum *Caſwell* paid to the overſeers of *Ledbury* on the 8th of *December* following, but on the day after the conviction, being the 6th of *December*, he gave a written notice of appeal to the next ſeſſions againſt the order ſo made by *M. Bowles* on 29th *November* 1797, and alſo another notice of appeal againſt the conviction on 29th *December* 1797. This appeal was tried at the *Epiphany* quarter ſeſſions at *Hereford* in *January* 1798, when the Court quaſhed the order of 29th *November* 1797 and the conviction grounded thereon, but reſerved this caſe for the opinion of the Court, 1ſt, Whether the appeal could be maintained at all by the appellants againſt the order of 29th *November* 1797, being ſubſequent to the conviction of the 5th *December*? and 2dly, If the appeal could be maintained, Whether the Court of Quarter Seſſions ought not to have affirmed the order of 29th *November* 1797 and the conviction, and not have quaſhed the ſame?

Milles and *Bayley*, in ſupport of the order of ſeſſions, contended 1ſt, That Mr. *Bowles* the magiſtrate had no authority under the militia laws to make the order of the 29th of *November* 1797 on the pariſh of *Stoke Prior*. 2dly, That *Brown*'s wife was not ſuch a perſon for whoſe maintenance any order could be made by a magiſtrate. 3dly, That the order was defective in the frame of it, being for reimburſement inſtead of for maintenance. It does not ſtate that the family relieved were reſident in the pariſh of *Ledbury*, or that they were chargeable. 4thly, That the conviction itſelf is informal and muſt be quaſhed; as it recites only an order of reimburſement, without either ſtating or referring to any order of maintenance, upon which ſuch order of reimburſement can alone be ſupported. As to the firſt, the ſtatute 33 *Geo.* 3. *c.* 8. *ſ.* 3. enacts that "if the family of any ſubſtitute

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ſerving in the militia when embodied and called out into actual ſervice ſhall become chargeable to the pariſh wherein ſuch family ſhall dwell, and ſuch ſubſtitute ſhall not ſerve for the ſame pariſh, *it ſhall be lawful for the juſtice of the peace who ſhall make any order for the relief of ſuch family at the ſame time to direct* the overſeers of the pariſh for which ſuch ſubſtitute ſhall ſerve *to reimburſe the money* ſo paid to the overſeers who ſhall have advanced the ſame in purſuance of the order before mentioned" &c. It appears therefore that the order for reimburſement muſt be made by the ſame juſtices and at the ſame time as the order for maintenance; whereas the order for maintenance here was made by Mr. *Cocks* in *February* 1793, and the order for reimburſement by Mr. *Bowles* above four years afterwards, viz. not till *November* 1797. In the *King* v. *White* and another (*a*) the Court put the ſame conſtruction now contended for on the 19 *Geo.* 3. *c.* 72. *ſ.* 2. which contains a proviſion ſimilar to that contained in the ſtatute in queſtion. Beſides, it is alſo an objection to this order that it was made without any previous notice to the pariſh of *Stoke Prior*, which had therefore no opportunity of ſhewing cauſe againſt it. As to the ſecond point; the 34 *Geo.* 3. *c.* 47. *ſ.* 2. enacts that "if the commanding officer of any regiment of militia ſhall diſcharge any militia-man, whether principal or ſubſtitute, at his own requeſt, on his producing another man to ſerve in his ſtead (which is the caſe in queſtion), and ſuch militia-man ſhall produce ſuch perſon, *who ſhall be ſworn and enrolled accordingly*, the wife and family of ſuch perſon ſo produced enrolled and ſworn ſhall be entitled to the ſame relief as the wives and families of every other ſubſtitute are by the ſaid act (viz. the 33 *Geo.* 3. *c.* 8.) and this act entitled to." Now *Brown* was never enrolled, nor approved by two deputy-lieutenants, which is alſo required by 26 *Geo.* 3. *c.* 107. *ſ.* 24., and conſequently his wife and children were not entitled to the relief granted. It is true that this court in *R.* v. *Willis* (*b*) held that an order for reimburſement was binding on the pariſh of a ſubſtitute, although ſuch ſubſtitute ought not to have been accepted, having more than one child: but the ground of deciſion there was that, having been in fact approved by two deputy-lieutenants of the county and enrolled, the previous want of qualification could not be gone into. In ſupport of the third and fourth objections, they referred generally to the order and conviction returned with the

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(*a*) *Cald.* 183. 1 *Conſt. Bott.* 379. *S. C.*

(*b*) *Ante*, 6 vol. 179.

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the caſe. It was afterwards obſerved that the ſtatute of the 34 *Geo.* 3. *c.* 47. was not paſſed till the 4th *May* 1794, and the order was made in *February* 1793 without any ſtatute to warrant it.

The Court deſired the counſel on the other ſide to apply themſelves to the firſt objection, which as then adviſed appeared to them to be fatal.

Leyceſter and *P. Stanhope*, contrà, referred to the 7th ſect. of 33 *Geo.* 3. *c.* 8. which directs that *where allowances ſhall have been made* between the 1ſt *December* 1792 and the 4th *March* 1793 to the wives and families of ſuch ſubſtitutes &c. by any order recommendation or other act of any juſtice of the peace, or by the payment of any pariſh officer &c., they ſhall be reimburſed to ſuch perſons in like manner as is hereinbefore directed to be done with reſpect to the like payments authoriſed and required to be made by virtue of this act; and obſerved that here the allowance was paid within the period provided for, viz. in *February* 1793. And as to the conſtruction of the act contended for, that the order for reimburſement ſhould have been made in the firſt inſtance, that, they contended, could not have been the meaning of the Legiſlature; for till the money was expended the magiſtrate could not tell what ſum he ſhould order to be reimburſed. Though even if it were neceſſary that an order for reimburſement ſhould be made at the ſame time with the order for maintenance, the firſt order made in *February* 1793 may be conſidered as an order of reimburſement; for at the concluſion the pariſh of *Stoke Prior* "are thereby required to reimburſe the ſame" &c.

Lord Kenyon, Ch. J. The act of parliament directs in poſitive terms that the order for reimburſement ſhall be made *by the ſame juſtice*, and *at the ſame time*, as the order for maintenance; and ſuch has been the conſtruction before put on theſe words in the caſe referred to. There ſeems alſo good reaſon for requiring that to be done; as the inhabitants of a pariſh are a fluctuating body, and it would be unjuſt that one ſet of perſons at a great diſtance of time ſhould be called on to diſcharge burthens which were incurred before they became inhabitants. Neither is there any difficulty in the order of reimburſement being made proſpectively. The 7th ſect. of the 33 *Geo.* 3. *c.* 8., which has been relied on, as ſpecially authoriſing the order of reimburſement in its preſent form, has reference to its being made *in like manner* as is therein before directed, namely in the 3d ſect., upon which I have already given my opinion, that it muſt be made by the ſame magiſtrate and at the ſame time as the order of maintenance; whereas this order was not made upon the pariſh of *Stoke Prior* until above four years after the firſt order upon *Ledbury*, which cannot therefore be ſaid to be in compliance with or under the authority of the act. And the concluding part of the firſt order cannot be taken to be an order on the pariſh of *Stoke Prior*, being directed not to them but to the overſeers of *Ledbury*. If the objection had only been that the ſubſtitute was not approved or enrolled, probably I ſhould have thought (though it is not neceſſary to decide that point) that upon the principle of our determination in *R.* v. *Willis* that proviſion in the ſtatute was only directory; and that if the ſubſtitute were ſworn and actually ſerved he was entitled to all the benefits of the act; in the ſame manner as where the 17 *Geo.* 2. *c.* 3. *ſ.* 1. directs that the poor's rate ſhall be publiſhed in the church the next *Sunday* after the allowance of it, and that no rate ſhall be deemed valid without ſuch notice, a perſon paying under ſuch a rate will nevertheleſs gain a ſettlement (*a*) thereby.

Ashhurst, J. The order ſhould have been ſerved on the pariſh of *Stoke Prior* before any crime could attach on them for diſobeying it.

Per Curiam, Rule for quaſhing the order of ſeſſions diſcharged.

(*a*) Vid. the caſe of *St. Giles's Cripplegate* v. *St. Mary Newington*, 19 *Vin.* 386.

Saturday, May 5th.

The King *againſt* The Inhabitants of Ulverstone.

Under a hiring from *Whitſuntide* to *Whitſuntide*, a ſervice of 365 days, though leſs than the period of the contract in the particular year, is ſufficient to confer a ſettlement.

TWO juſtices by an order removed *E. Brocklebank* a pauper from *Hawkſhead* to *Ulverſtone*, both in the county of *Lancaſter*. The ſeſſions on appeal confirmed the order, ſubject to the opinion of this court on the following caſe.

The pauper being legally ſettled in *Ulverſtone*, and being an unmarried woman, was hired to one *M. Hodgſon* of *Hawkſhead* to ſerve him from *Whitſuntide* 1796 to *Whitſuntide* 1797. She accordingly entered into his ſervice on the *Saturday* after *Whitſunday* being the 21ſt *May* 1796 and continued to ſerve him in *Hawkſhead* till the *Thurſday* before the following *Whitſunday*, being the 1ſt *June* 1797, when her maſter diſcharged her, ſhe

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being pregnant of a baſtard child, of which ſhe was delivered on the 1ſt *July* following.

Barrow in ſupport of the order of ſeſſions contended that as in *Newſtad* v. *Holy Iſland* (*a*) a hiring from *Whitſuntide* to *Whitſuntide*, though leſs in the particular year than 365 days, was holden to be a ſufficient hiring for a year to enable the pauper to gain a ſettlement, ſo where it appears to have been the intent of the parties that the hiring ſhould be according to ſuch eccleſiaſtical diviſion of the year, the parties ought to be holden to the ſame term of ſervice in order to acquire a ſettlement, though it happened as in this caſe to be more than the 365 days. But as the pauper was diſcharged for a legal cauſe before *Whitſuntide* happened again, ſhe could not gain a ſettlement in *Ulverſtone*.

Beſt and *Raincock* contrà were ſtopped by the Court.

Lord KENYON, Ch. J. The caſe is too plain for argument. The only queſtion is whether a ſervice for more than 365 days is not a ſervice for a year. The term eccleſiaſtical year is altogether new and was never before applied to this ſubject.

Per Curiam, Order of ſeſſions quaſhed.

It was afterwards obſerved by one of the counſel for the appellants that the order of removal was directed in this caſe to the "churchwardens and overſeers of the poor of the *pariſh*, *townſhip*, *or diviſion* of *Ulverſtone*" &c. and that as ſuch a deſcription was frequently adopted in orders of removal and was the ſubject of diſpute, it was wiſhed to have the opinion of the Court whether ſuch a deſcription was proper; to which

Lord KENYON, Ch. J. anſwered that as at preſent adviſed he ſaw no objection to it.

(*a*) *Burr. S. C.* 669.

J. COWLEY ſurviving Aſſignee of J. and A. PETERS *againſt* JAMES DUNLOP and R. DUNLOP.

Friday, May 18th.

THIS was an action of aſſumpſit brought by the plaintiff as ſurviving aſſignee of the eſtate and effects of *John Peters* and *Alexander Peters* bankrupts for money paid laid out and expended by the plaintiff and one *John Neale* (his co-aſſignee deceaſed) in the lifetime of the ſaid *John Neale* to and for the uſe of the defendants.

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fendants. There were alſo counts in the declaration for money had and received, and upon an account ſtated,

The defendants pleaded the general iſſue; they alſo pleaded ſeverally that they had become bankrupts, to wit, *James Dunlop* on the 7th of *November* 1785, and *Robert Dunlop* on the 14th of *December* 1786, and that the ſeveral cauſes of action accrued before their reſpective bankruptcies. They alſo pleaded the ſtatute of limitations.

On the trial at the ſittings in *London* after *Hilary* term 1796 before Lord *Keuyon* the jury found a verdict for the plaintiff, damages 528 *l.*, ſubject to the opinion of this court on the following caſe.

In 1785 an exchange of bills to a very large amount took place between *J.* and *A. Peters* linen drapers and the defendants merchants; and the ſeveral bills hereinafter mentioned to have been drawn by the defendants on Meſſrs. *Peters* and by Meſſrs. *Peters* on the defendants paſſed between the parties without any other conſideration being given for them by either of the parties than their mutual counter-acceptances. It was agreed that each party were to pay their own acceptances, which they reſpectively did as long as they reſpectively continued ſolvent. In *November* 1785 *J.* and *A. Peters* became bankrupts. In the ſame month the defendant *J. Dunlop* became a bankrupt; and in the month of *December* 1786 *R. Dunlop* alſo became a bankrupt, but they had been unable to pay their ſeveral acceptances for ſome time before the bankruptcy of Meſſrs. *Peters*. The bills drawn by the defendants on Meſſrs. *J.* and *A. Peters* and accepted by them amounted to the ſum of 3000 *l.* and upwards; part of thoſe acceptances was paid by Meſſrs. *Peters* before their bankruptcy, and the ſum of 1792 *l.* 10 *s.* 8 *d.* on their outſtanding acceptances was proved under their commiſſion, and dividends paid thereon to the amount of 1224 *l.* 18 *s.* The bills drawn by Meſſrs. *Peters* on the defendants and accepted by them amounted alſo to the ſum of 3000 *l.* and upwards, and which remained unpaid at the time of the bankruptcy both of the defendants and of Meſſrs. *Peters*, and upon which the eſtate of Meſſrs. *Peters* has paid dividends to the amount of 2211 *l.* 15 *s.* 10 *d.*, which payments of 1224 *l.* 18 *s.* and 2211 *l.* 15 *s.* 10 *d.* by Meſſrs. *Peters* exceed the full amount of the acceptances they were to provide for by the ſum of 1644 *l.* 3 *s.* 2 *d.* Moſt of the above mentioned bills were proved under the reſpective commiſſions againſt *J. Dunlop* and *R. Dunlop*,

lop, and all of theirs are ſtill proveable under the ſaid commiſſions. A dividend of ſixpence in the pound has been made of the eſtate and effects of *J. Dunlop* under the commiſſon iſſued againſt him. The amount of the ſeveral dividends paid from the eſtate of Meſſrs. *Peters* ſubſequent to the bankruptcy of the defendants exceeds the amount of their outſtanding acceptances by the ſum of 1644*l.* 3*s.* 2*d.*: but the amount of ſuch exceſs of dividends paid within the time of the ſtatute of limitations, giving credit for the dividend paid under the commiſſion againſt *J. Dunlop*, is the ſum of 528*l.* only, for which the verdict is taken. No final dividend has been declared under either of the three commiſſions of bankrupt, and all the bankrupts had ſeverally obtained their certificates before the commencement of this action. This ſum of 1644*l.* 3*s.* 2*d.* has been attempted to be proved under the commiſſion againſt the defendants, but the commiſſioners rejected the proof.

This caſe was argued on the 3d of *February* 1797 by *Wood* for the plaintiff and *Cook* for the defendants, and again on the 26th of *January* laſt by *Erſkine* for the former and *Gibbs* for the latter: but there being a difference of opinion upon the Bench, the caſe ſtood over until this day when the Judges delivered their opinions ſeriatim.

LAWRENCE J. Upon this caſe the tranſaction between the parties is ſhortly this:

The *Peters'* accepted bills to a large amount for the *Dunlops* in exchange for other bills accepted by the *Dunlops* to as large an amount for the *Peters'*, which bills were negotiated by both the parties. The Houſes of *Peters* and of *Dunlops* afterwards became bankrupt, in conſequence of which the aſſignees of the *Peters'* were obliged to pay a dividend as drawers on the bills accepted by *Dunlops*, as well as to pay the bills accepted by the *Peters'*; all which was done ſubſequent to the bankruptcy of the *Dunlops*: and the queſtion is if the certificate of the *Dunlops* be a bar to the plaintiff's claim; and I think that it is. In ſtating the reaſons that occur to me in ſupport of this opinion, I ſhall purſue the diviſion which Mr. *Gibbs* made in his argument, as I think the only means by which the rights of the parties can be clearly ſeen is by conſidering diſtinctly the different ſums paid by the *Peters'*; and by this ſome of the difficulty, which ariſes from compounding payments depending on diſtinct contracts, will be done away.

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If the plaintiffs recover, it muſt be either the money paid in diſcharge of the acceptances of the *Peters'*, or of the bills drawn by them; and Mr. *Wood* in the courſe of the firſt argument contended that the *Peters'* having lent the defendants their acceptances, no debt accrued till they paid them, and on that account the certificate was no bar, conceiving the plaintiffs' claim to be founded on paying the acceptances they had made, to accommodate the defendants.

But they are not in my opinion entitled to recover the money paid in diſcharge of the acceptances of the *Peters'*, inaſmuch as in doing that that was only paid which the *Peters'* engaged to do in conſideration of the *Dunlops* having given them their acceptances. The contract between the parties was, not that the *Dunlops* ſhould repay the money which might be paid in diſcharge of the *Peters'* acceptances but, that they would make themſelves liable by a ſimilar inſtrument to diſcharge the money ſecured by ſuch inſtrument; and a ſecurity for money, giving a remedy in caſe of non-payment, may well be a conſideration of a ſimilar engagement. Had there been no conſideration, the law would have implied a promiſe to repay: but no implied promiſe to repay can be raiſed where there is an expreſs contract, to which the party may reſort, the conſideration of which does not wholly fail. In *Touſſaint* v. *Martinnant*, *Buller* J. ſaid (*a*) "In ancient times no action could be maintained at law, where a ſurety paid the debt of his principal; and the firſt caſe of the kind in which the plaintiff ſucceeded was before *Gould* Juſtice at *Dorcheſter*, which was decided on equitable grounds; now why does the law raiſe ſuch a promiſe? becauſe there is no ſecurity given by the party: but if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe; promiſes in law only exiſt where there is no expreſs ſtipulation between the parties." And though an implied aſſumpſit may be raiſed in caſes of expreſs contracts, where the original contract is reſcinded either by ſome event provided for by the original terms of the contract, by the ſubſequent agreement of the parties, or by the conſideration wholly failing, (in which laſt caſe where a ſum of money has been paid it may be recovered back in an action for money had and received), yet if the contract be open, and the conſideration does not wholly fail, the expreſs contract of the parties muſt be reſorted to; and here

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(*a*) *Ante*, 2 vol. 105.

the conſideration does not wholly fail, for recourſe has been had to the acceptances of the defendants, upon which the holders of the bills have received a dividend from their eſtate.

The fallacy of the argument, as applied to this queſtion, is the conſidering the *Peters'* as lending their acceptances without any conſideration, without recollecting that the acceptances of the *Dunlops* was the conſideration of the acceptances of the *Peters'*; and that ſuch is a good conſideration is laid down in *Rolfe* v. *Caſlon*, 2 *H. Bl. Rep.* 570. That was an action brought by the drawer of a bill of exchange againſt the acceptor: The facts of the caſe were theſe;—the plaintiff and defendant being deſirous of accommodating each other, the plaintiff drew a bill on the defendant payable to his order, which the defendant accepted, and the defendant drew on the plaintiff for preciſely the ſame ſum payable to his order, which the plaintiff accepted, and neither had effects of the other in his hands. The queſtion was if the defendant's acceptance created a debt which the plaintiff could prove under the commiſſion; and the Court was of opinion "that the two bills were mutual engagements, conſtituting a debt on each part, the one being a conſideration for the other; that the bill in queſtion was not given as an indemnity, which was in its nature conditional, but created an abſolute debt from the beginning capable of being proved under the commiſſion, and barred by the certificate." And this caſe is an anſwer to Mr. *Wood*'s propoſition, that there was no legal debt until the acceptances were paid. For theſe reaſons the plaintiff is not entitled to recover the amount of the acceptances of the *Peters'*.

Nor can the plaintiff recover the money paid in diſcharge of the bills drawn by the *Peters'*, though the bills ought to have been paid by the *Dunlops*, inaſmuch as this payment aroſe out of a tranſaction conſtituting a debt payable in futuro anterior to the bankruptcy of the *Dunlops*.

The conſideration of the *Dunlops'* bills is the bills of the *Peters'*, and the queſtion will be juſt the ſame as if the conſideration, inſtead of bills, had been goods ſold, or money lent to the *Dunlops*, and the ground on which the claim of the *Peters'* againſt them is founded is that of the drawers of the bills of exchange of which the *Dunlops* were the acceptors. If the *Peters'* had never negotiated theſe bills, there can be no doubt but that they might have proved them under the commiſſion againſt the *Dunlops*; and the circumſtance of the *Peters'* having negotiated the bills will make no difference, for the ſituation of the *Peters'* is not worſe than it would have been if they had not parted with the bills. For if the indorſees had returned the bills to the *Peters'*, they would have ſtood juſt in the ſame ſituation as if they had never parted with them, and they might then have proved them under the *Dunlops'* commiſſion; and that they would have been entitled ſo to do, though they had not the bills at the time of the bankruptcy of the *Dunlops*, appears by the determination of Lord C. *Thurlow* in the caſe ex parte *Brymer* reported in *Co. Bankr. L.* 164. 4th ed. There one *Forſyth* having drawn bills on *Wilkins* payable to the order of *Span* who indorſed them over, *Wilkins* became a bankrupt, and afterwards *Span* as indorſer was obliged to take them up, and having been admitted a creditor under *Wilkins*'s commiſſion, on a petition to expunge the proof of the debt, Lord *Thurlow* was of opinion that the debt was proveable by *Span*, and he diſmiſſed the petition and continued of the ſame opinion on a re-hearing. And the ſame was holden in the caſe ex parte *Seddon* by Lord *Loughborough* C. 26th *November* 1796. *Seddon* and others the petitioners, having a bill of exchange accepted by one *Oldham*, indorſed it and delivered it to the bankrupts in conſideration of their promiſſory note for the ſame ſum, which note they indorſed to *Down* and Co. bankers; *Paty* and Co. the bankrupts negotiated *Oldham*'s bills, which he paid, and after the bankruptcy of *Paty* and Co. the petitioners as indorſers of the bankrupts' note were obliged to pay it to *Down* and Co.; and the Chancellor ordered that the petitioners ſhould be admitted creditors under the commiſſion for this note. And that it is not neceſſary that ſuch creditor ſhould be in poſſeſſion of the note at the time of the bankruptcy further appears from the caſe of *Bingley* and *Maddiſon*, *M.* 1783. *Co. Bankr. L.* 22. where it was holden that the indorſee of a note after the bankruptcy was a good petitioning creditor. Thus it would have been if the bills had been negotiated and returned without the indorſees proving them. And the indorſees proving the bills under the commiſſion will not make any difference, for having done that, they can only call on the *Peters'* for the deficiency beyond the dividend paid by the *Dunlops* which is juſt what the *Peters'* would loſe if they had kept the bills and proved them themſelves, in which caſe the certificate would have barred them. Their negotiation of the bills ſubſtituted others in their place with reſpect to their claims on the *Dunlops*, but did not enlarge thoſe claims. While the indorſees are holders of the bills, the

the *Peters'* have no claim whatever on the *Dunlops*, they have transferred their right to others; and when the bills ſhall be returned upon their taking them up it will be juſt as if they had never parted with them, for the right to recover on the bills is not done away by negotiating them. If it were, much of the ſecurity which a bill-holder has would be loſt by negotiation; for if *A.* ſhould indorſe to *B.*, and *B.* to *C.*, and *C.* to *D.*, and *D.* ſhould return the bill to *C.*, though he poſſibly might recover againſt *B.* on the original conſideration on which the bill was tranſferred to him, yet I do not ſee what action *C.* could have againſt *A.* or the drawer but on the bill. That the right to ſue on the bill is not loſt by the indorſement is ſettled in the caſe of *Death* v. *Serwonters*, 1 *Lutw.* 886. That was an action by the ſecond indorſee againſt the acceptor; and the declaration ſtated the cuſtom of merchants to draw bills of exchange and to indorſe them, and that if the acceptor fail paying the bill to an indorſee, then by the cuſtom if the immediate previous indorſer pay the money, the acceptor is liable to pay the money to that indorſer, as he would have been if he had not made any indorſement; judgment was given for the plaintiff, and affirmed in error in the Exchequer-chamber, where it was objected that by this means the acceptor would be liable to the payee and all the indorſers, and ſo be charged ſeveral times: but this was not allowed, for by the indorſement of the payee he was diſcharged from any payment to him, and by the indorſement of the plaintiff from any payment to him till he was again entitled to receive it by payment of the money to the indorſee. Now as according to this caſe the indorſer who pays is to be conſidered as having never made any indorſement, if he could likewiſe inſiſt on his having laid out money for the uſe of the acceptor, it would be in his power either to come in under the commiſſion or not as he pleaſed, and his debt at the ſame time might be conſidered as ariſing both before and after the bankruptcy. If the indorſer who pays the whole cannot ſue for the whole after the acceptor's certificate, he cannot be in a better ſituation by paying a part only inſtead of taking up the bill. This is an anſwer to Mr. *Wood*'s and Mr. *Erſkine*'s argument of their not having the bills.

But it has been contended that after the negotiation of the bills it was a matter of contingency whether the *Peters'* would or would not be ever called on to pay, and that on payment a new debt aroſe, as in the caſe of principal and ſurety. But this caſe is diſtin-

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diſtinguiſhable from that of a ſurety, who pays money for his principal after his bankruptcy; for the contract in ſuch a caſe is from its nature conditional, and it is a matter of uncertainty and contingency whether at any time any claim will ariſe on the principal. But that is not the caſe of the drawer of a bill, who may, after he has negotiated it and been obliged to pay it, maintain an action or ſue out a commiſſion on the bill itſelf, juſt as if he had never parted with it. When he takes up the bill he is referred back to his original contract, according to the caſe of *Death* v. *Serwonters*; until the bill gets back to the drawer, the acceptor is diſcharged with reſpect to the drawer; when the drawer gets back the bill, his right revives and the bill which is the evidence of the contract of the acceptor proves that his undertaking was to pay a certain ſum of money at a fixed time and not on any contingency. In ſhort the queſtion comes to this, Whether the drawer of a bill of exchange, who is obliged to take it up after having negotiated it, is not confined to his action on the bill to recover againſt the acceptor? And it ſeems to me that he is, for I ſee no reaſon to raiſe an implied aſſumpſit as for money paid by the drawer for the acceptor, when the contract ariſing out of the bill and the cuſtom are fully ſufficient to enable him to recover what he may be obliged to pay on the acceptor's refuſal.

In addition to theſe reaſons it appears to me that a contrary doctrine would militate againſt the deſign of the bankrupt laws, which is to ſet fair traders free from the engagements they may have made previous to their bankruptcies; and that it will be very miſchievous if conſiderable dealers in trade, whoſe bills are in a ſtate of negotiation at the time of their bankruptcies, ſhould be liable to the utmoſt amount of their bills after having given up all their effects. Surely it cannot depend on the negotiation or non-negotiation of a bill by the payee whether a debt created anterior to a bankruptcy ſhall or ſhall not be barred by it. The caſes which preſs upon this opinion of mine are thoſe of *Howis* v. *Wiggins* (*a*), and *Brooks* and *Rogers* (*b*). With reſpect to the laſt, Lord *Loughborough* who was chief juſtice when that caſe was decided, on further conſideration and of the caſes which had not been mentioned in the courſe of that argument, held differently in the caſe ex parte *Seddon*, which undoubtedly leſſens the force of it. I argued that caſe as being the caſe of principal and ſurety, and

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(*a*) *Ante*, 4 vol. 714.

(*b*) 1 *H. Bl. Rep.* 640.

conſidered *Brooks* as lending his name to *Rogers* to get money on the draft of *Rogers* of the *Olney* bank, and that in ſubſtance it was an advance of money to *Rogers* on the credit of *Brooks*'s name as a ſurety to the bank: but I doubt if that argument is not fallacious, for on *Brooks*'s carrying the bill to the bank, the bank lent him the amount of it upon the ſecurity of the bill and of his name, and when *Rogers* received the money, it was a loan to him by *Brooks* on the ſecurity of the bill, on which *Brooks* was entitled to recover when returned to him for non-payment. As to the caſe of *Howis* and *Wiggins*, I ſenſibly feel the preſſure of it, and with the weight of ſuch an authority againſt me, I cannot but be apprehenſive that I have proceeded upon falſe grounds. I have endeavoured to diſcover wherein I may be miſtaken but without ſucceſs, and according to the beſt judgment I have been able to form after much conſideration, the certificates in this caſe are bars to the demand. And the anſwer I give to the queſtions propoſed is that the plaintiff is not entitled to recover, and that a verdict muſt be entered for the defendants.

Grose, J. The right of the plaintiffs depends upon the queſtion whether the certificate of the defendants is a bar to the action; in other words whether the debt on the bills accepted by the defendants could be proved by the plaintiffs under the commiſſion againſt the defendants. [Here Mr. J. *Groſe* ſtated the caſe.] To make the caſe more intelligible, I will ſimplify it, and ſuppoſe it to be a caſe on two bills accepted and exchanged between *A.* and *B.*: it will then ſtand thus; *A.* exchanges his acceptance for 3000*l.* with *B.* for a like acceptance; *A.* pays his own acceptance; *B.* becomes a bankrupt and cannot pay his, in conſequence of which the bill-holder calls on *A.* the drawer, and he pays that which *B.*'s eſtate could not pay. What then is the ſituation of the parties? *A.* in paying his own acceptance has only performed his engagement and paid what he was bound to pay: but upon *B.*'s acceptance, on which he was the drawer, he is a creditor on the eſtate of *B.*; *B.* the acceptor was bound to pay him upon the bill; his right of action ariſes upon the bill, and not upon any contract collateral to the bill. If there had been no bankruptcy, and *A.* had in default of *B.* paid *B.*'s acceptance, *A.* might have ſued *B.* as acceptor on the bill; and upon the eſtate of *B.* as acceptor of the bill he had a right to prove the money he had paid as drawer. To this purpoſe is the caſe of *Rolfe* v.

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Caſlon (*a*); where *A.* drew a bill of exchange on *B.* payable to the order of *A.* which *B.* accepted; and *B.* drew a bill on *A.* payable to the order of *B.* which *A.* accepted, for their mutual accommodation, both bills being made payable at the ſame time, having the ſame dates, and containing the ſame ſums. There it was holden that the one acceptance was a good conſideration for the other, and not merely an indemnity; ſo that if either party became a bankrupt the bill accepted by him might be proved under his commiſſion; and that conſequently to an action brought on ſuch bill his bankruptcy and certificate might be pleaded in bar. Now apply the doctrine in that caſe to the preſent, and it will ſtand thus; the bills accepted by the *Dunlops* were a good conſideration for the bills accepted by the houſe of *Peters;* the *Dunlops* having become bankrupts the bills accepted by them might have been proved under their commiſſion; and conſequently to an action brought on them the certificate of the defendants may be pleaded in bar. The argument ſet up by the plaintiff is that the right of the *Peters'* does not ariſe on the bills: but the fact is not ſo; the whole tranſaction is founded on the bills. The debt from the defendants to the houſe of *Peters* does not ariſe from the latter having paid their own acceptances, for thoſe they were bound to pay; but from the defendants having omitted to pay their acceptances, in conſequence of which the houſe of *Peters* were bound to pay as drawers, and are by law remitted to their right to recover againſt the *Dunlops* as acceptors. This is the true foundation on which the houſe of *Peters* could have any right to recover againſt the *Dunlops*; and to this effect is the caſe of *Death* v. *Serwonters*, 1 *Lutw.* 885 to 888. *A.* draws a bill of exchange upon *B.* payable to *C.*, which *B.* accepts; *C.* indorſes it to *D.*: now by this indorſement *B.* is diſcharged of the payment to *C.*, and if *D.* indorſe it to *E*, then *B.* is diſcharged of any payment to *D.*; but if *D.* pay the money to *E.*, then *D.* becomes again entitled to receive the money of *B.* So if *C.* pay the money to *D.*, then *B.* is diſcharged as to *D.*; but *C.* becomes *newly* entitled, and *B.* is again liable to him, but diſcharged againſt *D.* and *E.* So here the *Dunlops* not having paid their acceptances to the holders, the drawers were obliged to pay them; and when they have paid they become again entitled, and the *Dunlops* are again liable. In other words the houſe of

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(*a*) 2 *H. Black. Rep.* 570.

Peters are remitted to their right on the bills, which when in the hands of other holders was ſuſpended as to them. Theſe are caſes at law, and prove the right of the *Peters'* on the bills. And conſiſtent with thoſe caſes is I underſtand the practice of the Court of *Chancery;* according to which (as I apprehend) the *Peters'* might have proved their claim upon the bills after they had paid what was due upon them and had taken them up. Ex parte *Brymer*, *Co. Bankr. Laws*, 211; and ex parte *Seddon*, *November* 1796, before Lord *Loughborough* C. The petitioners there were creditors before the bankruptcy upon a promiſory note of the bankrupts for 385*l.* 10*s.* 6*d.* payable to the petitioners, the conſideration of which was a bill drawn by the petitioners and accepted by one *Oldham* for the like ſum: at the time of the bankruptcy the note was not in the hands of the petitioners, ſo that it could not be proved at that time under the commiſſion, but coming afterwards to their hands the Lord Chancellor permitted it to be proved; for having given a valuable conſideration for it, there was till it was paid a debt due to them upon the note. So here, the *Peters'* having given a valuable conſideration for the acceptances of the *Dunlops*, there was till they were paid a debt due to them upon theſe acceptances. Theſe caſes therefore prove that upon the acceptances of the *Dunlops* being paid by the *Peters'* their right accrued on the bills; and that upon thoſe bills they might have proved their debts under the commiſſion of the *Dunlops*.

This is the plain way of conſidering the caſe, by which I think the material arguments for the plaintiff are anſwered. Not that the caſe is without its difficulties; and had I been compelled to have decided inſtantly on the former argument, thoſe of the plaintiff ſtruck me ſo forcibly that my opinion inclined towards a deciſion in his favor. They were, 1ſt, That there was no cauſe of action till the bankruptcy. But there lies the fallacy and miſtake; for the inſtant the bills were exchanged, each was indebted to the other in the ſum which was the amount of their reſpective acceptances; for the counter acceptances were a good conſideration to found a debt upon on either ſide reſpectively. So is the caſe of *Rolfe* v. *Caſlon*, 2 *H. Blac.* 570. 2dly, It was ſaid that the *Peters'* have paid more than they ought to pay. This will always happen upon the exchange of acceptances and an inſolvency of one of the parties, where one has paid and the other has not. The ſolvent man is bound to pay his own acceptances as acceptor and the acceptances of the other as drawer: but the debt due to him from the other does not ariſe from the payment of his own acceptances, but upon his name ſtanding as drawer on bills of which the other is acceptor, and which always conſtitutes a debt to the drawer. 3dly, It was ſaid that when the *Peters'* paid the *Dunlops'* acceptances a new conſideration aroſe, to which the certificate is no bar. To which I anſwer in the negative: the right of the *Peters'* is not founded on a new conſideration, but they are remitted to their old right, which ariſes on the bills and not on a fact collateral to the bills; and the not attending ſufficiently to this diſtinction (I ſuſpect) led me at firſt into a contrary opinion, occaſioned by comparing this caſe to that claſs of caſes where a man without conſideration accepts a bill which another promiſes to take up. There at the time of drawing the bill there is no debt to the acceptor; the debt accrues only by payment of the money. The acceptor quâ acceptor can never be a creditor; his acceptance imports the admiſſion of a debt from him to another; and when he has paid as acceptor, if he paid for any other perſon in conſequence of any requeſt from that other, he becomes a creditor, not on the face of the bill, but by a contract collateral to the bill. When two perſons exchange acceptances, each becomes the debtor of the other upon his accepted bills. But when a man accepts without conſideration, he is never a creditor of the perſon for whom he accepts till he pays; from that payment ariſes the debt: but where the acceptances are exchanged, the debt ariſes from thoſe acceptances. The firſt caſes in which this claſs of men, who were refuſed the liberty of proving under the commiſſion, were permitted to ſue the bankrupt after his certificate, were caſes of indemnity. Upon that ground were determined the caſes ex parte *Adney*, *Cowp.* 460. *Young* v. *Hockley*, 2 *Black. R.* 839. *Chilton* v. *Whiffin*, 3 *Wilſ.* 13. *Vanderheyden* v. *De Paiba*, ib. 528. *Goddard* v. *Vanderheyden*, ib. 262. *Heſkuyſon* v. *Woodbridge*, M. 24 *Geo.* 3. *Dougl.* 166. n.; all which were actions by acceptors againſt the drawers on promiſes of indemnity, i. e. to repay the acceptors if the drawers did not take up the bills when due; and *Taylor* v. *Mills* and another, *Cowp.* 525. which was an action on an indemnity bond. The caſe ex parte *Adney* was this; *A.* in conſideration of 1 *l.* 10 *s.* 7 *d.* received of *B.* undertook in writing to make himſelf liable for the due payment of a note upon which *H.* was indebted to *B*: *A.* before the note was due became bankrupt; held that *A.*'s undertaking was a collateral engagement only in caſe *H.* ſhould not pay the note when due; conſequently as it reſted in contingency whether it would ever become a debt or not, it could not be proved as ſuch under *A.*'s commiſſion. Here in reſpect to the *Peters'*, as drawers of the bills, the debt was certain and exiſted at the time of the bankruptcy, although the bills were in other hands.

As to the caſes of *Brooks* v. *Rogers*, and *Howis* v. *Wiggins*, this caſe has been reſerved for the purpoſe of reconſidering them. The gentlemen in the Court of Chancery conceive that thoſe deciſions are directly in oppoſition to their daily practice. And of the caſe of *Brooks* v. *Rogers* it is remarkable that the Lord Chancellor, who in 1791 determined that caſe as Chief Juſtice of C. B., ſo doubted of it, that upon reconſidering it in the caſe ex parte *Seddon* he overruled it and permitted the debt to be proved. The caſe of *Howis* v. *Wiggins* came on before this Court upon a motion for a new trial; and poſſibly under a miſapprehenſion of it, I conſidered it as a caſe of indemnity; and the ground on which the rule was refuſed was on a ſuppoſition that *Vanderheyden* v. *De Paiba*, which was a caſe of indemnity, was in point. I then conſidered *Howis* the plaintiff and payee of the two promiſory notes as having indorſed them as ſurety for the defendant, with a view to give credit to the notes, and without any conſideration given to him for ſo doing. In any other way of conſidering that caſe, I think it is not to be ſupported. It ſeems therefore in this way of conſidering the queſtion that by the deciſions both at law and in the Court of Chancery the debt accruing upon the acceptances was a debt at the time of the bankruptcy, and as ſuch might have been proved under the commiſſion; and that therefore the certificate is a bar. And in ſo deciding, the Court is furthering the intention of the legiſlature in favour of bankrupts, whoſe plan it was to liberate that claſs of men from their debts before incurred, which would be very much obſtructed if in a caſe like the preſent a bankrupt were, after giving up his all, to be liable to demands for thouſands of pounds accrued due upon acceptances before his bankruptcy.

ASHHURST J. This was an action brought by the plaintiff againſt the defendants for money paid laid out and expended for their uſe. The defendants pleaded the general iſſue, and their bankruptcy and certificates, and that the cauſe of action accrued before their reſpective bankruptcies. The facts of the caſe are, that in the year 1785 an exchange of bills to a large amount took place between the *Peters'* and the *Dunlops*, and ſeveral bills paſſed

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between them to the amount of 3000 *l.* each, without any other conſideration being given to them by either party than their mutual acceptances, *and it was agreed that each party were to pay their own acceptances.* The *Peters'* before they became bankrupts paid ſeveral bills drawn upon them by the *Dunlops*, and the reſt of the *Peters'* acceptances were proved and diſcharged under their commiſſion. But the whole of the *Dunlops'* acceptances remained unpaid a conſiderable time after the bankruptcy of all parties; and the eſtate of the *Peters'*, beſides paying their acceptances, was in advance by payments made ſubſequent to the bankruptcy of the *Dunlops* for them in the ſum of 528 *l.*, for which the verdict was taken in this cauſe.

The queſtion is, Whether at the time of the bankruptcy of the *Dunlops* that ſum was or was not a debt proveable under their commiſſion? and according as this is decided, the conſequence will follow of courſe, whether the debt is or is not barred by the bankruptcy and certificate. It is a general rule of law that where one man pays a debt for another which he was liable to pay, that is money paid for his uſe, and gives a new cauſe of action to the party ſo paying. The queſtion is, whether this caſe comes within that rule. Here there was no other conſideration than the mutual acceptances, and it was part of the original agreement that each was to pay his own. Then taking that to be the tranſaction, there could not be ſaid to be any debt exiſting by or from either party, provided they had kept to their ſeveral ſtipulations, and had each paid their own acceptances; conſequently no debt could ariſe but by future failure of the parties. And it is laid down in *Chilton* v. *Whiffin* (*a*) that no debt can be barred but what was contracted with certainty before the act of bankruptcy. This caſe ſeems to me to be the ſame in effect with that of *Young* and another v. *Hockley* (*b*). There the defendant drew a bill of exchange on the plaintiffs payable to his own order; the plaintiffs at the defendant's requeſt and on his promiſe to indemnify them accepted the bill, which becoming due after the defendant's bankruptcy the plaintiffs paid it to prevent being ſued; and it was holden that they could not prove this as a debt under the commiſſion, and therefore that the defendant could not plead his certificate in bar of the action on the promiſe to indemnify. The caſe alſo of *Taylor* v. *Mills* and another (*c*) ſeems very appoſite to the preſent, where it was holden that a ſurety

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(*a*) 3 *Wilſ.* 17.

(*b*) 3 *Wilſ.* 346.

(*c*) *Cowp.* 525.

in a bond who pays the debt after a commiſſion of bankrupt iſſued againſt his principal is not barred by the certificate, though the penalty of the bond was forfeited before. And Lord *Mansfield* ſaid that at the time of the bankruptcy the defendants *were not indebted to Taylor*; he clearly therefore could not come in as a creditor under the commiſſion; *he was not damnified at that time*; and till damnified, which he could not be till he had been called upon and had paid, he could not bring an action. He ſaid further, that the caſe did not ſeem to him to be different from any where the cauſe of action, though it ariſe after the bankruptcy, is founded on a pre-exiſting ground. And the other judges were of the ſame opinion. The caſes of *Chilton* v. *Whiffin* (*a*), and *Vanderheyden* v. *De Paiba* (*b*), which are not denied to be law, affirm the ſame principle; and ſo does the caſe of *Howis* v. *Wiggins* (*c*). Now here the debt could never ariſe but by the failure of one of the parties to fulfil this engagement; and that did not happen till after the bankruptcy of the *Dunlops*, till when the debt was not aſcertained.

This caſe therefore ſeems to fall exactly within the principle laid down by Lord *Mansfield* in *Taylor* v. *Mills*. It is the common caſe where the cauſe of action ariſes after the bankruptcy, though founded on a pre-exiſting ground; and therefore this demand could not legally be proved under the *Dunlops*' commiſſion. Indeed it is ſtated as a fact in the caſe that the commiſſioners rejected the proof; and I think they did right, becauſe at the time of the bankruptcy of the *Dunlops* the eſtate of the *Peters*' had not paid nor aſcertained the debt due from the *Dunlops*, which they were afterwards obliged to do in conſequence of the *Dunlops*' not paying their acceptances agreeably to their undertaking. And if at the time of the bankruptcy of the *Dunlops* there was not ſuch a debt aſcertained as was proveable under the commiſſion, but it only aroſe afterwards upon a contingency, it will conſequently not be barred by the certificate; and therefore I am of opinion that the poſtea ſhould be delivered to the plaintiff.

Lord Kenyon Ch. J. This caſe has remained for judgment longer than we wiſhed. It is always expedient (if it can be effected) to decide on the intereſts of parties immediately, and parti-

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(*a*) 3 *Wilſ.* 17. (*b*) *Ib.* 528. (*c*) *Ante*, 4 vol. 714.

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particularly in caſes of bankruptcy, becauſe it lets in a more ſpeedy arrangement of the bankrupt's eſtate. The delay in this caſe has not ariſen from a want of our conſidering it again and again, but from a hope that we entertained of at length arriving at the ſame concluſion. It is not however in the nature of the mind of men always to ſee every part of an intricate argument in the ſame light; and when we do not, it is a duty we owe to the public to ſtate the grounds of our opinion. If the ſyſtem of the bankrupt laws had not been framed, it might perhaps appear reaſonable to enact that a bankrupt, who has dealt fairly by his creditors and has parted with all he has in the world, ſhould be delivered from every obligation he had made prior to his bankruptcy. But it is now too late to cancel, on ſuch a principle, all the deciſions at one ſtroke. It is clear that a bankrupt, who has acted moſt fairly, may in a variety of inſtances ſtill remain liable on contracts made before his bankruptcy. It is extremely clear that where a bankrupt has taken a leaſe and entered into covenants for payment of rent and for repairing, &c. though the leaſe is taken from him and blended with the general maſs of his property and divided among his creditors, yet his certificate will not deliver him from his liability to perform the covenants contained in that leaſe.

The bankrupt's remaining ſtill liable, and the creditor not being able to prove his debt under the commiſſion, are convertible terms. Then could this debt have been proved under the *Dunlops*' commiſſion? if it could, their certificate delivers them from it; if not, the certificate does not deliver them. Without repeating the facts of this caſe, or noticing each particular caſe alluded to, I will aſſume this as a principle, which is ſettled by the caſe of *Goddard* v. *Vanderheyden* and ſome of the other caſes already mentioned, that where a man enters into an obligation as ſurety (and there is no neceſſity for an abſolute promiſe, an implied promiſe has the ſame conſequence in law) for another, and is after the bankruptcy of the other called on to pay money in diſcharge of the obligation entered into by him for the bankrupt, a cauſe of action accrues to him which is not barred by the certificate. The way in which I have conſidered this queſtion leads me to draw the ſame concluſion that my brother *Aſhhurſt* has drawn, without encountering any deciſion. When theſe bills were drawn and accepted, they conſtituted an obligation on the acceptors, by which they were primarily liable to pay the perſon who ſhould have a title to the bills and be in a condition to call for payment of the money: but they only conſtituted an obligation to the amount of the ſums contained in the bills; as ſoon as they had paid that money, they the acceptors (the principal debtors) were diſcharged from every obligation. The holder of the bills tacitly engaged firſt to apply to the acceptors for payment, and on their failure only to reſort to the drawers or indorſers. I lay out of my conſideration the caſes ex parte *Brymer* and ex parte *Seddon*, becauſe they only ſhew that though the indorſer of a bill of exchange was not in poſſeſſion of the bill at the time of the bankruptcy, yet if he gets poſſeſſion under a perſon who had a legal title to it he may come in and prove his debt under the commiſſion; he is then (as my brother *Groſe* obſerved) remitted to his former title: but I yield to that propoſition with this qualification, that he has a right to call on the acceptor for payment if the acceptor has not been called on by ſome perſon who had a better right to require payment, for if the acceptor has paid he is delivered from all reſponſibility and cannot be again called upon to pay the bill. Then let us conſider what the preſent caſe is; the holders of theſe bills have made uſe of them up to their extent, and proved them under the commiſſions againſt the *Dunlops*, the acceptors. And after the eſtate of the *Dunlops* has been called upon to pay dividends up to the extent of theſe bills, ſhall it be permitted to another perſon, who gets poſſeſſion of the bills, to come upon the eſtate of the *Dunlops* again? That would be charging the eſtate of the *Dunlops* twice for the ſame debt. Proving the debt under the commiſſions againſt the *Dunlops* and receiving a dividend was equivalent to payment. If that be ſo, there is an end of the queſtion beyond all doubt; for here the holders, having a legal right to the bills, obtained ſatisfaction from the eſtate of the *Dunlops*, not indeed in monies numbered, but ſuch a ſatisfaction as the law has pointed out in this caſe: the acceptors were then delivered from all liability under the bills. But then aroſe another liability, in conſequence of the *Peters'* having become ſureties for the acceptors; when the drawers paid the bills, they had a right to call on the acceptors for whoſe uſe they had paid that money as for ſo much money paid laid out and expended for their uſe. I before ſtated, and on that I rely, that when the ſecurity of a bill is given, the acceptor is the principal debtor; to him the holder

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holder muſt firſt apply, and on his failure the holder may have recourſe to the drawer. But here down to the time of the bankruptcy of the defendants, it was impoſſible for the houſe of *Peters'* to call on the eſtate of the *Dunlops* for payment. If the bills, though once negotiated, had come back again to the *Peters*, they would have been remitted to their better right, and might have proved their debt under the commiſſions againſt the *Dunlops:* but as the bills were not in the hands of the *Peters'* at that time, and were put in force againſt the eſtate of the *Dunlops* by the perſons who had the legal right to them, the *Peters'* could not prove theſe bills again under the ſame commiſſion. Whether or not the *Peters'* could have proved theſe bills under the *Dunlops'* commiſſion will be ſeen by conſidering whether or not they could have maintained an action at law againſt the *Dunlops* before the bankruptcy: had ſuch an action been brought, it would have been an anſwer to it to have ſhewn that the bills had been already paid by the *Dunlops.* The eſtate of the *Dunlops* having once paid theſe bills, I cannot conceive how the *Dunlops* could be again liable on the bills; and yet the affirmative of that propoſition muſt be eſtabliſhed before any fair oppoſition can be made to the preſent action. As it is clear that the *Peters'* could not have brought any action againſt the *Dunlops* on theſe bills before the bankruptcy, it ſeems to follow that having been called upon after the bankruptcy of the *Dunlops* to pay this money which the *Dunlops* were bound to pay, the right of action accrued to the *Peters'* only on payment after the bankruptcy, on the ſame ground that a ſurety, who pays money for his principal after his bankruptcy, may ſue the principal, and the debt is not barred by the bankruptcy and certificate of the principal.

I am therefore of opinion that the plaintiff is entitled to judgment. But as the Court are equally divided, no judgment can be given in this caſe.

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Monday, May 7th.

Where there are ſeveral facts material to the plaintiffs' action, ariſing in different counties, the plaintiff may bring his action in either.

If a local action be brought and tried in a wrong county, the defect is aided after verdict by ſtat. 16 & 17 *Car.* 2. *c.* 8.

COVENANT by the leſſors againſt the aſſignees of the leſſees. The declaration ſtated that by an indenture made on the 25th of *February* 1777 *at London* the plaintiffs demiſed to *P. Longes* and others, truſtees for the *Artillery* company, "All that piece or parcel of ground being part of the ground called or known by the name of the *Artillery Ground*, and heretofore part of the field commonly called or known by the name of *Bunhill Field* in the pariſh of *St. Luke* in the county of *Middleſex*," for 60 years under the yearly rent of 5 *l.* for the firſt 30 years and 20 *l.* per annum for the remainder of the term; in which leaſe were contained ſeveral covenants on the part of the leſſees, one of which was that the captains of the trained bands of the city ſhould and might from time to time when and ſo often as it ſhould ſeem good to the Lord Mayor of the city or to the ſaid captains have free liberty of ingreſs egreſs and regreſs together with the trained bands to muſter train and exerciſe the ſaid trained bands upon the ground demiſed, without any charge for the ſame, and without any let ſuit trouble denial &c. by the leſſees &c. That by virtue of that demiſe the leſſees entered; and on the 1ſt of *December* 1796 *at London aforeſaid* all their eſtate right title &c. in and to the ſaid demiſed premiſes *by aſſignment thereof then and there duly made* came to and veſted in the defendants; by virtue of which aſſignment they afterwards entered &c. Then it ſtated certain breaches of the covenant, that the captains of the trained bands had not had free liberty of ingreſs egreſs and regreſs together with the trained bands &c., for that *C. Porter* and *T. Jennings* two of the ſaid captains were on ſeparate days prevented by the defendants entering on the ſaid ground for the purpoſe of training muſtering and exerciſing the ſaid trained bands &c.

To this the defendants put in nine pleas, among which were the following; that the leſſors did not demiſe to the original leſſees modo & formâ; that the eſtate &c. of the original leſſees did not come to or veſt in the defendants by aſſignment modo & formâ; and that the ſaid captains had free ingreſs &c.

Iſſues were joined on all theſe pleas, and found for the plaintiffs on the trial in *London*, ſubject to the opinion of this court on a caſe reſerved. The only queſtion in that caſe was whether the

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militia of *London*, raiſed by the ſtat. 26 *Geo.* 3. *c.* 92. in lieu of the trained bands, could or could not be exerciſed in the *Artillery Ground* within the meaning of the covenant contained in the leaſe of 1777? This Court, being clearly of opinion that they might, ordered the poſtea to be delivered to the plaintiffs in the laſt term.

After the above caſe was diſpoſed of the defendants moved in the laſt term to arreſt the judgment, on the ground that the action was local and ſhould have been tried in the county of *Middleſex* where the land was ſituate, on the authority of *Barker* v. *Damer*; *Carth.* 182; 1 *Show.* 191; 3 *Mod.* 337. and *Salk.* 80.

Gibbs, *Jackſon*, and *R. Smith*, now ſhewed cauſe againſt that rule. Firſt; the foundation of the application fails, becauſe it is not expreſsly alleged in the declaration that the land lies in the county of *Middleſex*, or out of *London*. It is not ſtated that the *Artillery Ground*, the land demiſed, lies in *Middleſex*, but merely that formerly it was part of a field commonly called *Bunhill Field* in the pariſh of *St. Luke*, in the county of *Middleſex*; which is nothing more than that the ground was reputed to lie in *Middleſex*. And if it be doubtful whether the land lie in *Middleſex* or *London*, that alone is a ſufficient reaſon for diſcharging the rule; for unleſs it clearly appear on the record that there has been a miſtrial, the plaintiffs are entitled to their judgment. But, ſecondly, if the land demiſed be locally ſituate in *Middleſex*, two of the iſſues joined in this caſe were on facts alleged to have happened in *London*, and therefore were properly tried in *London*. The firſt is on the *demiſe made at London*; the ſecond alſo is on the *aſſignment made at London*; for in the declaration it is alleged that the demiſe was made at *London*, and the aſſignment at *London aforeſaid*, and the pleas deny both thoſe allegations modo et formâ. And if only one of the material facts on which the action is founded aroſe in *London*; the plaintiff had his option either to bring his action there or in the county where the other facts happened. In *Bulwer*'s caſe (*a*) the rule is clearly laid down, "In all caſes where the action is founded upon two things done in ſeveral counties, and both are material or traverſable, and the one without the other doth not maintain the action, there the plaintiff may chooſe to bring his action in which of the counties he will (*b*)." This rule has always been acted upon, and was

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(*a*) 7 *Co.* 2. a.

(*b*) See alſo *Scott* v. *Breſt*, *ante*, 2 vol. 241. per *Aſhhurſt* J.

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particularly recognized in *Gregſon* v. *Heather* (*a*). Thirdly; but even if the action were improperly brought in *London*, the defendants ſhould have demurred and cannot take advantage of this objection after verdict by reaſon of the ſtat. 16 & 17 *Car.* 2. *c.* 8. which enacts that if any verdict ſhall be given in any action &c. judgment thereupon ſhall not be ſtayed or reverſed "for that there is no right venue, *ſo as the cauſe were tried by a jury of the proper county or place where the action is laid.*" And though it was at firſt doubted whether that act only applied to thoſe caſes where there was a wrong venue in the right county or to thoſe where the cauſe had been improperly tried in the wrong county, it has been ſolemnly adjudged that the latter is the true conſtruction of the act. *Craft* v. *Boite*, 1 *Saund.* 246; 1 *Ventr.* 22; and Sir *T. Raym.* 181; 3 *Salk.* 364. 2 *Vin. Abr.* 334. *Chew* v. *Briggs*, 12 *Mod.* 7; *Santler* v. *Heard*, 2 *Bl. Rep.* 1033. per *Blackſtone* J; and the Mayor &c. of *Berwick* v. *Ewart*, *ib.* 1071. per *Gould* J. The only caſe in which a contrary rule was adopted is that of *Thurſby* v. *Plant* (*b*); for the caſe of *Barker* v. *Damer*, on the authority of which this rule was obtained, is diſtinguiſhable from the preſent; in that caſe there was a plea to the juriſdiction of the court, and a demurrer to the plea, ſo that the ſtat. 16 & 17 *Car.* 2. could not apply to it. And of *Thurſby* v. *Plant* it is ſufficient to obſerve, 1ſt, that it was decided before that of *Craft* v. *Boite* and the other caſes above referred to in which a contrary rule was eſtabliſhed; and 2dly, it was argued when the ſtat. 16 & 17 *Car.* 2. was ſuſpended; for that act had force at firſt only for three years and to the end of the ſeſſion of parliament afterwards; and though the ſtatute was afterwards revived and made perpetual by ſtat. 22 & 23 *Car.* 2. *c.* 4., it's operation was ſuſpended when *Thurſby* v. *Plant* was decided. And if this defect of mis-trial (if any) were not cured by the ſtat. 16 & 17 *Car.* 2., it clearly was cured by a ſubſequent ſtat. 5 *Geo.* 1. *c.* 13., which enacts that where any verdict has been or ſhall be given in any action &c. the judgment thereupon ſhall not be ſtayed or reverſed for any defect or fault *either in form or ſubſtance* in any bill, writ original or judicial, or for any variance in ſuch writs from the declaration or other proceedings. *French* q. t. v. *Wiltſhire*, 2 *Str.* 1085.

(*a*) 2 *Str.* 727, and 2 Ld. *Raym.* 1455.

(*b*) 1 *Saund.* 237. 1 *Sid.* 401. 1 *Lev.* 259; and 2 *Keb.* 439. 448. 468. 492.

Erſkine,

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Erſkine, *Law*, and *Garrow*, in ſupport of the rule. Firſt, it does ſufficiently appear that the premiſes, in reſpect of which the action is brought, lie in *Middleſex*. The reputation is only annexed to the name, not to the locality, of the place; it is alleged in the declaration that the *Artillery Ground* is part of *Bunhill Field*, which *Bunhill Field* is in the county of *Middleſex*. Secondly; this being an action of covenant againſt the aſſignees of the leſſees, it ſhould have been brought in *Middleſex* where the land lies; for this is an action founded, not on any privity of contract but, on a privity of eſtate only. This therefore is as much a local action as an ejectment, which muſt be brought in the county where the lands are ſituate, otherwiſe it is error on the record. In *Wey* v. *Yally* (*a*) Lord *Holt* ſaid that, the action being brought againſt the aſſignee of the leſſee, "it was grounded upon the privity of eſtate which is local, and therefore to be brought where the land lies." And as the aſſignees of the leſſees are not liable on any privity of contract, it is immaterial in what place the demiſe and aſſignment were made. Thirdly; then if this were a defect originally, it is not cured by the ſtat. 16 & 17 *Car.* 2., which only applies to caſes where there was an improper venue in the right county, for before that ſtatute it was neceſſary to award the venue from the particular hundred. And the act expreſsly ſays "but that all ſuch omiſſions variances defects and all other matters of the like nature not being againſt the right of the matter of the ſuit, *nor whereby the iſſue or trial is altered*, ſhall be amended by the judges of the courts where ſuch judgments are or ſhall be given;" evidently meaning that the trial ſhould ſtill be in the proper county. Such was the conſtruction put on the ſtatute in *Barker* v. *Damer*, which caſe was afterwards recognized by *Holt* Ch. J. in 6 *Mod.* 194., where he ſaid "your caſe of *Barker* v. *Damer* is good law." That this was the intention of the Legiſlature is further manifeſted by adverting to the ſtat. 21 *Jac.* 1. *c.* 13. "an act for the further reformation of jeofails," which ſays that no judgment ſhall be ſtayed "by reaſon the viſne is in ſome part miſawarded or ſued out of more places or of fewer places than it ought to be, *ſo as ſome one place be right named.*" And with regard to the ſtat. 5 *Geo.* 1. *c.* 13. that is only applicable to caſes where there is ſome defect in the writ or variance between the writ and declaration or other proceedings, but does not extend to caſes where there has been a mis-trial.

(*a*) 6 *Mod.* 194.

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Lord KENYON Ch. J. Had it not been for the caſe alluded to by the defendant's counſel, it would not have occurred to me that this was a local action. An action, the fruit of which is the delivery of the land itſelf, is neceſſarily local, becauſe the poſſeſſion of land ſituate in one county cannot be delivered by the ſheriff of another. But great inconveniences would follow a determination that an action of covenant, where damages only are to be recovered, muſt be brought in the county where the lands, in reſpect of which the covenant was made, are ſituate. We have valuable poſſeſſions in diſtant parts of the world, particularly in the *Weſt India* iſlands, great part of which is transferred from hand to hand in this country; and if no action could be brought here on the covenants contained in ſuch conveyances, there would be a failure of juſtice. Without diſcuſſing that point however, I think there is great weight in all the anſwers given to this application by the counſel for the plaintiffs. In the firſt place, it does not clearly appear that the land lies in the county of *Middleſex:* it is deſcribed as *heretofore* part of a field in the pariſh of *St. Luke* in the county of *Middleſex:* but for any thing that appears on this record this field may have changed its juriſdiction; ſo lately as in the reign of *Henry* VIII. part of *Cheſter* was taken out of that county, and the ſame thing has happened in ſeveral other counties. At the moſt the words uſed in this declaration are equivocal. The next anſwer alſo has great weight. Here one iſſue was on the fact of the execution of the deed in *London* on which the action is brought; that iſſue was properly tried in *London*. What is ſaid on this ſubject in the caſe cited from *Strange* (*a*) is pointed; " 7 *Co. Bulwer*'s caſe is expreſs that where matter in one county is dependent on matter in another county, the plaintiff made lay his action in either. *Et per Curiam:* The law is certainly ſo." Then conſider the effect of the ſtat. 16 & 17 *Car.* 2.: that would little deſerve the name of an omnipotent act, as it has ſometimes been called, unleſs it would cure ſuch an objection as the preſent that is taken merely to elude the juſtice of the caſe. But I think that that act has cured this defect, if it were a defect; and I cannot expreſs myſelf in better terms than *Kelynge* Ch. J. and *Rainſford* and *Morton* Juſtices did in one of the caſes (*b*) cited, who ſaid that " the words of the ſtatute were plain; that the iſſue was tried by a jury of the proper county where the action was brought,

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(*a*) 2 *Str.* 727.

(*b*) 1 *Saund.* 247, 8.

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which was within the expreſs words of the ſtatute, and (as they conceived) within the intent of the ſtatute."

ASHHURST J. declared himſelf of the ſame opinion.

GROSE J. This rule was obtained principally on the authority of *Barker* v. *Damer:* but on referring to that caſe it appears that the queſtion aroſe on a demurrer and not on a motion in arreſt of judgment. I admit that where an action of covenant is brought on a privity of eſtate, and not of contract, the action muſt be brought in the county where the lands lie: if it be not brought there, the defendant muſt take advantage of it before verdict, otherwiſe the defect is cured by the ſtat. 16 & 17 *Car.* 2. In addition to the caſes cited there is another of *Adderley* v. *Wiſe*, 2 *Lev.* 164., where an iſſue having been tried in *London* on a feoffment of lands in *Oxfordſhire* a motion was made in arreſt of judgment becauſe the action was local and ought to have been brought in *Oxfordſhire*, but " per *Vaughan* Ch. J. & *Curiam* reſolved this is cured by the ſtatute of Jeofails 17 *Car*. 2. by the expreſs words thereof, being tried in the county where the action is brought;" and they referred to the caſe in 1 *Saund.* 246. The caſe in *Levintz* is therefore applicable to the preſent; becauſe it ſhews that even in caſes where the action is local, the objection that it has been tried in another county cannot prevail on a motion in arreſt of judgment.

LAWRENCE J. The rule laid down in *Bulwer*'s caſe gives a deciſive anſwer to this application; it ſhews that where ſeveral material facts ariſe in different counties the plaintiff may bring his action in either. The inſtance of an ejectment, to which this caſe has been compared, is very diſtinguiſhable from this; there if the action is not brought in the proper county, a difficulty would ariſe with reſpect to the execution, for the ſheriff of one county cannot deliver the poſſeſſion of land in another. Then with regard to the effect of the ſtat. 16 & 17 *Car*. 2.; the defendant's counſel wiſh us to put a conſtruction on it different from that which it has received in the ſeveral deciſions alluded to by the other ſide: but in thoſe caſes (*a*) it was ſolemnly decided that that ſtatute remedied ſuch a defect as that complained of in the preſent caſe.

Rule diſcharged.

(*a*) The ſame point was ruled in *Leving* v. Lady *Calverly*, 1 Ld. *Raym.* 330. *Carth.* 448., and alſo in the caſe of The Bailiffs and Citizens of the City of *Litchfield* v. *Slater*, *Mich.* 1743, *C. B.* after a conſideration of all the authorities.

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Tueſday, May 8th.

ROE on the Demiſes of ELIZABETH SHEERS and JOHN MAWSON and MARY his Wife *againſt* WILLIAM JEFFERY, RICHARD BUTLER, and ELIZABETH GOODYER.

Under a deviſe to *T. F.* and his heirs for ever, and in caſe he ſhould depart this life *and leave no iſſue* then to *E. M.* and *S.* or the ſurvivor or ſurvivors of them ſhare and ſhare alike, the deviſe to *E. M.* and *S.* is a good executory deviſe.

THE following caſe was reſerved on the trial of this ejectment at the laſt ſummer *Warwick* aſſizes for the opinion of this Court.

J. Goodacre, being ſeiſed in fee of the premiſes in queſtion, by will dated 20th *May* 1754 deviſed to his wife *A. Goodacre* for life, after her deceaſe to his daughter *Mary Friſwell* wife of *W. Friſwell* for life, and after her death to his grandſon *T. Friſwell* ſon of *W.* and *M. Friſwell* and to his heirs for ever; "but in caſe his ſaid grandſon *T. Friſwell* ſhould *depart this life and leave no iſſue*, then (his will was) that the ſaid dwelling-houſe &c. ſhould be and return unto *Elizabeth Mary* and *Sarah* the three daughters of *W.* and *M. Friſwell* or the ſurvivor or ſurvivors of them to be equally divided betwixt them ſhare and ſhare alike;" nevertheleſs his will was that the ſaid premiſes ſhould go to his ſon *W. Goodacre* for life immediately after the deceaſe of his wife *A. Goodacre*, "and after his deceaſe the ſaid premiſes and every part thereof to go as above-mentioned to his daughter *M. Friſwell* and her iſſue as aforeſaid." On the deviſor's death in 1757 his wife *A. Goodacre* entered, and continued in poſſeſſion until her death in *April* 1762, when *W. Goodacre* the ſon entered. In *Trinity* term 1764 the ſaid *Mary Friſwell* the daughter, (her huſband being then dead) *Thomas Friſwell* the grandſon and *W. Goodacre* levied a fine of the premiſes in queſtion, the uſes of which were declared to be to *E. Inge* to make him tenant to the præcipe in order that a common recovery might be ſuffered; in the *Trinity* term following a recovery was ſuffered, and the uſes were declared to be to *T. Goodacre* and *T. Cater* his truſtee, who afterwards conveyed the premiſes to *W. Jeffery* one of the defendants. *T. Friſwell*, the deviſor's grandſon, died in *September* 1766 unmarried and without iſſue, never having been in the poſſeſſion of the premiſes. *Mary Friſwell*, the daughter, died in *February* 1779. And *W. Goodacre*, the laſt tenant for life, died in *March* 1795. *Sarah Friſwell*, one of the daughters of *W.* and *M. Friſwell*, died in *Auguſt* 1782: *Elizabeth* another of the daughters and one of the leſſors of the plaintiff married *Sheers* and ſurvived him; and *Mary* the third daughter married *J. Mawſon*, and they are the other two leſſors of the plaintiff. The above defendants are tenants in poſſeſſion of the whole of the premiſes. An actual entry was made by the leſſors of the plaintiff after the death of *W. Goodacre* and before the day of the demiſes laid in the declaration.

This caſe was argued in laſt *Michaelmas* term by

Reader for the plaintiff. The queſtion is, Whether *Thomas Friſwell* the grandſon took an eſtate tail, or a fee defeaſible on the event of his leaving no iſſue at the time of his death? The eſtate is firſt given to him *and his heirs for ever*; "but in caſe he ſhould depart this life *and leave no iſſue*," then over. The queſtion then is, Whether by theſe latter words the deviſor intended the remainder over to take effect after an indefinite failure of iſſue of *T. F.*, or only in caſe he ſhould die without leaving iſſue at the time of his death? If the former, then indeed *T. F.* took an eſtate tail, which is barred by the fine and recovery; if the latter, then the deviſe over is good by way of executory deviſe. The firſt words of limitation would certainly carry the fee. It is true that their general operation may be confined by ſubſequent words to carry only an eſtate tail: but the Court muſt ſee clearly that ſuch was the intention of the deviſor. Now here the intention appears clearly to have been not to give *T. F.* an eſtate tail, but to confine the words "*and leave no iſſue*" to the time of the death of *T. F.*; and ſuch alſo is their grammatical conſtruction. If this were the caſe of perſonalty it would be perfectly clear; for ſince the caſe of *Forth* v. *Chapman* (*a*) to the preſent time ſuch words have always been conſtrued to mean, leaving iſſue at the time of the death of the firſt taker. It was ſo held in *Atkinſon* v. *Hutchinſon* (*b*), and *Read* v. *Snell* (*c*). It is true that Lord *Parker* in *Forth* v. *Chapman* took a diſtinction in this reſpect between a deviſe of a freehold and of a chattel intereſt; ſaying that the reaſon why a deviſe of a freehold to one for life, and if he die without iſſue then to another, is determined to be an eſtate tail, is in favour of the iſſue, that ſuch may have it. But then it is to be obſerved there was no expreſs deviſe to the iſſue of the firſt taker; and therefore if the firſt taker did not take an eſtate tail the iſſue would have nothing, which would have been contrary to the

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(*a*) 1 *P. Wms.* 663. (*b*) 3 *P. Wms.* 258. (*c*) 2 *Atk.* 642.

apparent intent of the deviſor. But here it is not neceſſary to make ſuch a conſtruction in favor of the general intent, becauſe a ſufficient eſtate is given to the anceſtor to carry it to his iſſue if he had any. Beſides, the diſtinction above alluded to was rejected by Lord *Kenyon* in *Porter* v. *Bradley* (*a*), which reſtored the law upon that ſubject to its true ground, viz. the intention of the deviſor. In theſe caſes the Court will not give an artificial meaning to words in order to defeat the intention of the deviſor; though in ſome caſes they will conſtrue words, which are properly words of limitation, to be words of purchaſe, in order to effectuate the intent. *Bagſhaw* v. *Spencer*, 1 *Vez.* 147. *Hodgſon* v. *Ambroſe*, *Dougl.* 341. The caſe before cited of *Porter* v. *Bradley* (*a*) is directly in point. There lands were deviſed to *A.* and his heirs, and if he die *leaving no iſſue behind him*, then over; and the limitation over was holden to be good by way of executory deviſe. It is true that ſome weight was laid on the words "*behind him*," as confirmatory of what the deviſor intended; but Lord *Kenyon* expreſsly ſaid that even if the firſt words only had been uſed, viz. "*leaving no iſſue*," they muſt be reſtrained to leaving iſſue at the time of his death, according to Lord *Macclesfield*'s opinion in *Forth* v. *Chapman*. Now here that intention is manifeſted from other parts of the will. The very next deviſe is of eſtates for life to the ſiſters of *T. F.* or the ſurvivor of them, which ſhews that the event on which the deviſe over was to take effect was in the contemplation of the deviſor to happen within the period of lives then in being, which cannot be ſuppoſed to have been intended after an indefinite failure of iſſue of the firſt taker. It may be ſaid indeed that he intended to give the ſiſters a fee; it appears however that he knew how to do that if he had ſo intended: but it is evident that he did not regard their iſſue; for in caſe of either of their deaths the whole was to go over to the ſurvivor. In *Keily* v. *Fowler* in 1768 (*b*), Lord C. J. *Wilmot* ſaid that he would lay hold of the moſt trifling circumſtance to give effect to the apparent intention of the teſtator. In *Hughes* v. *Sayer* (*c*) a bequeſt of perſonal eſtate to *A.* and *B.*, and if either die without children then to the ſurvivor, was holden a good deviſe over; becauſe though children unborn were conſidered the ſame as iſſue, yet the limitation over being

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(*a*) *Ante*, 3 vol. 146.

(*b*) Vide the ſame caſe mentioned in *Fearne's Ex. Dev.* 236. and 245.

(*c*) 1 *P. Wms.* 534.

to the ſurvivor ſhewed that the teſtator meant a dying without children living at the death of the party and not after an indefinite failure of iſſue. So in *Balguy* v. *Hamilton* (*a*) a bequeſt of perſonalty to the daughter, and immediately from and after her deceaſe without iſſue of her body then over, was holden to be a good bequeſt over. So 2 *Chan. Rep.* 187. Theſe indeed were caſes of bequeſts of perſonal property; but they ſerve to ſhew what ſmall circumſtances the courts have laid hold of to confine the words *leaving no iſſue* to the time of the death of the firſt taker. Here the intention clearly was not to leave the eſtates deviſed over to the granddaughters in the power of the grandſon, in which caſe he might defeat them by an act of his own; which muſt be the caſe if he is conſtrued to take an eſtate tail: but the Court will give effect to the deviſor's intent by conſtruing the limitation over to be good by way of executory deviſe.

Romilly contrà contended that *T. F.* the grandſon took an eſtate tail under the will, 1ſt, on the authority of decided caſes; 2dly, on principle. 1ſt, The caſe of *Forth* v. *Chapman* (*b*) is an authority for the defendant; for Lord *Parker* there held that as to the freehold eſtate the dying and leaving no iſſue muſt be taken generally, and not confined to a dying without iſſue at the time of the death of the firſt taker; though he thought otherwiſe as to the leaſehold. The ſame diſtinction was recogniſed by Lord *Hardwicke* in *Sheffield* v. Lord *Orrery* (*c*); ſo in *Southby* v. *Stonehouſe* (*d*), Lord *Stafford* v. *Buckley* (*e*), *Read* v. *Snell* (*f*), and *Atkinſon* v. *Hutchinſon* (*g*). In *Walter* v. *Drew* (*h*) the teſtator having two ſons *W.* and *R.* deviſed that if *W.* ſhould die and leave no iſſue of his body then he deviſed his lands to *R.* and his heirs; and it was there holden that *W.* took an eſtate tail by implication. The diſtinction taken in *Forth* v. *Chapman* was again recogniſed by Lord *Mansfield* in *Denn* d. *Geering* v. *Shenton* (*i*). There one deviſed lands to his grandſon *S.* and the heirs of his body, and their heirs for ever, chargeable with an annuity to *M.* for life, and in caſe *S.* ſhould die without leaving iſſue of his body then to *G.* in fee, chargeable with the like annuity, and alſo chargeable with the payment of 100*l.* to the teſtator's niece

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(*a*) *Moſeley's Rep.* 186.
(*b*) 1 *P Wms.* 663.
(*c*) 3 *Atk.* 288.
(*d*) 2 *Vez.* 616.
(*e*) 2 *Vez.* 180.
(*f*) 2 *Atk.* 642.
(*g*) 3 *P. Wms.* 261.
(*h*) *Com. R.* 372.
(*i*) *Cowp.* 410.

within one year after *G.* or his heirs ſhould be poſſeſſed of the premiſes. It was held that *S.* took an eſtate tail, notwithſtanding the circumſtances, which are ſimilar to thoſe here relied on, to ſhew a contrary intent, namely, the ſuppoſition that the eſtate would come to *G.* during the lifetime of the teſtator's niece then living, and the expreſs eſtate deviſed to the iſſue of the firſt taker; ſo that no neceſſity exiſted for putting that conſtruction on the will in order that the iſſue might take, as was ſaid with reſpect to *Forth* v. *Chapman*. As to all the caſes cited contrà (except that of *Porter* v. *Bradley*) it is ſufficient to ſay in anſwer that they were bequeſts of chattel intereſts, and therefore fall within the diſtinction in *Forth* v. *Chapman*. In *Porter* v. *Bradley* (*a*) the Court chiefly relied on the words "leaving no iſſue *behind him*," which meant the ſame as *ſurviving him*, and confined the general operation of the words to the time of his death. It is true Lord *Kenyon* is ſuppoſed to have gone further and to have ſaid that without thoſe latter words he ſhould have been inclined to put the ſame conſtruction on the others, and that he ſhould require a great deal of argument to convince him that a different conſtruction ought to be put on the ſame words in reſpect to real or perſonal eſtate. At moſt however this is only an obiter opinion, and that not a poſitive one. And his lordſhip in a ſubſequent caſe of *Daintry* v. *Daintry* (*b*) adopted the diſtinction in *Forth* v. *Chapman*; and the Court decided that after a deviſe upon a contingency to one and the heirs of his body, and if he ſhould die without iſſue of his body then over, the firſt taker took an eſtate tail in the real eſtates and the perſonal eſtate abſolutely. At any rate it is now too late to inquire whether the diſtinction was rightly taken in *Forth* v. *Chapman*; it has been ſo frequently recogniſed and acted upon ſince, that it would be dangerous now to overturn it. But 2dly, On principle; there does not ſeem any abſurdity in conſtruing the ſame words differently as applied to different ſubject-matters. This depends upon the different rules of law applicable to the reſpective ſpecies of eſtates. If a man deviſe all his freehold and leaſehold eſtates to *A.* without more, it is clearly ſettled that *A.* will take the freehold for life only, and the leaſehold abſolutely; and yet it is moſt probable that the teſtator meant to give the ſame abſolute intereſt in both. So here the legal operation of the ſame words muſt be different as to different eſtates;

(*a*) *Ante*, 3 vol. 146.

(*b*) *Ante*, 6 vol. 307. 314.

ROE *againſt* JEFFERY.

for *T. F.* would take the freehold in ſucceſſion to all his iſſue, but the leaſehold he would take abſolutely. The diſtinction is taken in theſe caſes in favour of the heir at law, whoſe intereſts are more favoured than thoſe of executors. And without ſupporting this diſtinction, as to the conſtruction of the words in queſtion, with reſpect to the two different ſorts of eſtates, the intention of the teſtator could not take effect entirely; for if they do not mean after an indefinite failure of iſſue, the deviſees over could not take the leaſehold. Suppoſing the firſt taker had died leaving a child, and that child had died immediately after, the teſtator muſt ſtill have meant that the limitation over ſhould take effect, which intention is negatived by the plaintiff's argument. It is more natural to ſuppoſe that the teſtator meant to limit the ſucceſſion of his property to as remote a time as he could, than to ſuppoſe that his intention was ſolely confined to limit it to the period of the death of the firſt taker.

Reader in reply obſerved, as to the caſe of *Walter* v. *Drew* (*a*), that the particular intent was there made to give way in order to effectuate the general intent, which was that the remainder over ſhould not take effect till after the extinction of the iſſue of *W.* who were to be firſt preferred; and that intent could not have been effectuated without giving *W.* an eſtate tail by implication, as there was no eſtate deviſed expreſsly to the iſſue. Beſides, that caſe was determined at a very early period before the doctrine of executory deviſes was ſo well underſtood as it is now; it was decided by a ſingle judge; and there were no other circumſtances as in the preſent caſe to ſhew a contrary intent. In the caſe of *Denn* v. *Shenton* (*b*) the firſt deviſe to the firſt taker was of an eſtate tail, whereas here it is in fee; and therefore the latter words there deviſing the eſtate over in caſe the firſt taker ſhould die without leaving iſſue of his body might well be taken to refer to the eſtate tail firſt deviſed, and ſerved to ſhew that the dying without iſſue was intended generally. As to *Daintry* v. *Daintry* (*c*) there ſeemed to have been ſome alteration in the opinion of the Court before the certificate was ſent; and the reaſons on which the certificate was founded not being diſcloſed, no argument can be drawn from thence.

(*a*) *Com. R.* 372. (*b*) *Cowp.* 410. (*c*) *Ante*, 6 vol. 307.

The Court ſaid they would conſider of the caſe: but

Lord KENYON Ch. J. then ſaid that the diſtinction taken in *Forth* v. *Chapman*, that the very ſame words in the ſame clauſe in a will ſhould receive one conſtruction as applied to one ſpecies of property and another conſtruction as applied to another, was not reconcileable with reaſon: but that if it had become a ſettled rule of property it might be dangerous to overturn it. That it had been quarrelled with by different judges, and that ſmall circumſtances had been relied on to take particular caſes out of the rule. His lordſhip added that he had then formed no deciſive opinion of this caſe, but that it appeared to him that there were circumſtances in the caſe to ſhew an intention in the teſtator that by *leaving no iſſue* he meant a *failure of iſſue of* T. Friſwell *at the time of his death*, the remainders over being life eſtates only. That he was not then prepared to unſay what he had ſaid in *Porter* v. *Bradley*, in which he had not given any judicial opinion reſpecting the diſtinction taken in *Forth* v. *Chapman*, but had merely ſaid that it required a good deal of argument to convince him of the propriety of that diſtinction.

The caſe accordingly ſtood over, and now

Lord KENYON Ch. J. delivered the opinion of the Court, after ſtating the caſe.

When we read this caſe at firſt, it appeared to us that there was no difficulty in it: but the defendant's counſel, in arguing it, ſeemed to think that if we decided againſt his client the eſtabliſhed law of the land would be overturned, and he preſſed the caſe of *Forth* v. *Chapman* on us with peculiar force. But it did not ſtrike me in the ſame light, and on the beſt conſideration that I have ſince been able to give to it at different times I think that this is a clear caſe and may be decided on principles that have not been diſputed for a century. We had occaſion a few days ago (*a*) to advert to this doctrine, when we ſaid that this is a queſtion of conſtruction depending on the intention of the party; and nothing can be clearer in point of law than that if an eſtate be given to *A.* in fee, and by way of executory deviſe an eſtate be given over which may take place within a life or lives in being and 21 years and the fraction of a year afterwards, the latter is good by way of an executory deviſe. The queſtion therefore in this and ſimilar caſes is, whether from the whole context of the will we

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(*a*) Vid. *Wilkinſon* v. *South*, ſup. 555.

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can collect that, when an eſtate is given to *A.* and his heirs for ever but if he die without iſſue then over, the teſtator meant dying *without iſſue living at the death* of the firſt taker. The rule was ſettled ſo long ago as in the reign of *James* the Firſt, in the caſe of *Pells* v. *Brown* (*a*), where the deviſe being to *Thomas* the ſecond ſon of the deviſor and his heirs for ever, and if he died without iſſue living *William* his brother then *William* ſhould have thoſe lands to him and his heirs for ever, the limitation over was a good executory deviſe. That caſe has never been queſtioned or ſhaken, but it has been adverted to as an authority in every ſubſequent caſe reſpecting executory deviſes; it is conſidered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the eſtabliſhed law of the land as (it was ſuppoſed by the defendant's counſel) we ſhould do if we decided this caſe againſt him. On looking through the whole of this will we have no doubt but that the teſtator meant that the dying without iſſue was confined to a failure of iſſue at the death of the firſt taker; for the perſons to whom it is given over were then in exiſtence, and life eſtates are only given to them. Now taking all this into conſideration together, it is impoſſible not to ſee that the failure of iſſue intended by the teſtator was to be a failure of iſſue at the death of the firſt taker; and if ſo, the rule of law is not to be controverted. It is merely a queſtion of intention, and we are all clearly of opinion that there is no doubt about the teſtator's intention. The conſequence of this is that there muſt be judgment for the plaintiff.

Poſtea to the plaintiff.

(*a*) *Cro. Jac.* 590.

Tueſday, May 8th.

Churchill *againſt* Gardner.

It is not neceſſary in a declaration on a bill of exchange to aver that the maker *delivered* it: it is ſufficient to ſtate that he *made* it.

This was an action on a bill of exchange by the payee againſt one of the acceptors. The declaration ſtated that *W. Bavin* on &c, made his certain bill of exchange in writing, dated &c, directed to the defendant and *J. Gough*, requeſting them to pay to the plaintiff or order 19*l.* 9*s.* 4*d.*, which bill *the defendant and J. Gough* accepted &c, by reaſon whereof and according to the cuſtom and law of merchants the defendant and *J. Gough* became jointly liable to pay to the plaintiff the ſaid ſum &c, and being ſo liable *the defendant* in conſideration thereof on &c, undertook &c.

To

1798.

Churchill *againſt* **Gardner.**

To this the defendant demurred ſpecially, and ſhewed for cauſe, that it is not alleged in the declaration, nor does it thereby appear, that *Bavin delivered* the ſaid bill of exchange to the plaintiff &c.

The plaintiff joined in demurrer.

Bayley, in ſupport of the demurrer, made two objections to the declaration. 1ſt, It is ſtated that the defendant and another accepted the bill, and thereby became jointly liable; therefore both ought to have been ſued. 2dly, It is not averred that the maker of the bill ever *delivered* it to the plaintiff. The mere *making* of a bill of exchange, without a delivery, transfers no right. In *Daſhwood* v. *Lee* (a) *Windham* J. ſaid "There is no failure of payment unleſs the bill were delivered." The modern precedents of declarations on bills of exchange ſtate a delivery. Therefore as it does not appear on this declaration that the bill was delivered by the maker, the plaintiff has not ſtated any cauſe of action on the record.

But *The Court* were clearly of opinion that there was no foundation for the ſecond objection, for that the delivery of the bill by *Bavin* to the payee was included in the allegation "that *Bavin* made the bill." That if the maker did not intend to put the bill into circulation when he made it, it would be open to the defendant to make that defence on the plea of the general iſſue. And they ſaid that this mode of declaring was warranted by many precedents. They alſo hinted a ſtrong opinion that there was no foundation for the firſt objection; but that if it had any weight at all, which they doubted, it ſhould either have been pleaded in abatement, or pointed out as a ſpecial cauſe of demurrer.

However they gave the defendant leave to withdraw his demurrer, and to plead to the declaration.

Wigley was for the plaintiff.

(a) 2 *Keb.* 303.

1798.

Wedneſday, May 9th.

The King *againſt* M. Bell and four others.

A. having granted to *B.* a leaſe for years of way-leaves (for the purpoſe of carrying coals) and the liberty of erecting bridges and levelling hills over certain lands, *B.* made the waggon ways, incloſed them thereby excluding all other perſons, erected bridges, and built two houſes on the land for his ſervants; held that *B.* was liable to be rated to the poor for "the ground called the waggon way." The occupier of land is liable to be rated to the poor, without conſidering whether he has any title.

The defendants, having been rated to the poor in the townſhip of *Wallſend* in *Northumberland* for "a piece or parcel of ground called a waggon way" at the yearly rent of 200 *l.*, being the rent they paid to the dean and chapter of *Durham* for the ſaid waggon way, appealed againſt the rate to the Seſſions, where the rate was confirmed, ſubject to the opinion of this Court on the following caſe.

The appellants are the leſſees and workers of certain coal mines which they hold under *Shafto Craiſter* eſq. and others ſituate at *Long Benton* &c. in *Northumberland*. For the purpoſe of rendering the collieries a beneficial concern a communication with the navigable river *Tyne* by a paſſage over the lands which lie between the pariſh of *Long Benton* and the ſaid river *Tyne* is abſolutely neceſſary. The lands which belong to and are ſituate in *Wallſend* lie immediately between the ſaid collieries and the river *Tyne*, and are contiguous thereto, and are all held of the dean and chapter of *Durham* by leaſes granted by them to their reſpective leſſees for terms of twenty-one years; and in all the leaſes which have been granted by the dean and chapter of lands in *Wallſend* a clauſe to the following effect is inſerted, "That the dean and chapter and their ſucceſſors ſhould have full and free authority and power of laying making and of granting waggon ways in and over the premiſes by them ſo demiſed in the different leaſes, paying reaſonable damages for the ſpoil of ground; the ſaid damages to be ſettled by two indifferent perſons to be choſen by the parties." The appellants, for the purpoſe of exporting the coals won by them in *Long Benton* and vending the ſame by ſea ſale contracted with the dean and chapter for certain way-leaves or liberties of paſſage for leading and carrying coals in waggons or otherwiſe, and for making laying and placing waggon ways erecting bridges and levelling hills and riſing grounds in through and over the lands and grounds ſituate in *Wallſend* which lay between the ſaid collieries of the appellants and the river *Tyne* and in the moſt convenient direction towards the river for a term of years and under a yearly rent. In purſuance of this contract the appellants on the 20th of *November* 1791 obtained from the dean and chapter a leaſe for twenty-one years at the yearly rent of 200 *l.* of way-

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leaves and liberties of paſſage in through and over the lands and grounds of *Matthew Waters* &c. &c. (thoſe lands being ſituate in *Wallſend* and being all held by leaſes heretofore granted by the dean and chapter) in ſuch direction towards the navigable river *Tyne* as the ſame was marked out in a certain plan or ſketch annexed to the ſame leaſe; and in the ſaid leaſe the appellants covenanted and agreed with the dean and chapter that they would make ſuch reaſonable ſatisfaction to *Matthew Waters* &c. for ſpoil of the ſoil by uſing the ſaid liberties and privileges to them granted by the ſaid leaſe as ſhould be ſettled by two indifferent perſons &c. The appellants, in purſuance of the powers contained in the ſaid leaſe, have accordingly made and laid a waggon way in through and over the grounds of *Matthew Waters* &c. in *Wallſend*, and to complete it they erected a bridge, and alſo in many places removed the ſoil and levelled the riſing ground, and for the whole length of the way in the line, as the ſame was ſtaked out to them, they put and placed ſleepers or dormant timbers below the ſurface of the ſoil, and to ſleepers or dormant timbers they affixed rail ways or waggon ways; they alſo built two houſes on parts of the ſaid way which are occupied by the gate-keepers or other ſervants of the appellants; and when the waggon way was finiſhed the appellants put and placed rails on both ſides of the way for the whole length of it, except where it was otherwiſe fenced by old hedges. They alſo placed four gates at different places acroſs it, which are always kept cloſe and locked by them, except at the times when their coal waggons are travelling upon the waggon way, by means of which four gates and railing all perſons as well the leſſees of the dean and chapter and their undertenants as all other perſons are kept off the waggon way. The whole of the ground which is taken up by the waggon way is between five and ſix acres; and all the way lies in *Wallſend*, which maintains its own poor ſeparately. The appellants are rated to the poor in *Long Benton* at the rate of 1200 *l.* per annum; being the annual rent which they pay for the liberty of working coals, breaking the ſoil, and the other privileges which they have by their leaſes in the pariſh of *Long Benton* only. And the 200 *l.* per annum which they pay to the dean and chapter for the waggon way in *Wallſend* is not part of the 1200 *l.* The grounds of the above mentioned leſſees of the dean and chapter through which this waggon way paſſes are let to undertenants, to whom no abatement out of their rents is made by their landlords for

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this way, but they (the undertenants) receive annually from the appellants a compenſation for the ſpoil of ground occaſioned thereby in proportion to the damage they reſpectively ſuſtain by the way, amounting to 17 *l.* The undertenants have been and continue to be rated to the poor in *Wallſend* according to the rents they pay to their landlords: no diminution of the ſums at which they were rated has taken place ſince the waggon way has been rated to the poor, and the waggon way was not rated to the poor before.

Holroyd, in ſupport of the order of ſeſſions, contended that the defendants were properly rated for the ground over which the waggon way paſſed, becauſe it appeared on the caſe that they had the excluſive poſſeſſion of the ſoil; in which reſpect this caſe was diſtinguiſhable from that of *R.* v. *Jolliffe* (*a*), where the party rated had only a right of way and was not the occupier of the ſoil, on which ground alone the judgment in that caſe proceeded.

Law and *Chambre* contrà. This is a ſpecies of property that has never yet been rated. The defendants have not the excluſive poſſeſſion of the ſoil, but a mere eaſement only, an incorporeal hereditament. Now by the ſtat. 43 *Eliz. c.* 2. only one kind of incorporeal hereditament is made the ſubject of a poor rate, namely, tithes; and it has been holden on the conſtruction of that ſtatute that as coal-mines only are mentioned in it no other kind of mines are rateable, on the ground that expreſſio unius eſt excluſio alterius. If the defendants were liable to be rated in reſpect of this way, the land would be twice rated, in the hands of the tenants as occupiers of the ſoil, and in the hands of the defendants in reſpect of an eaſement over the ſoil. The ſoil was not granted to the defendants, but merely a right of way for the particular purpoſe of enjoying their collieries: but the right of poſſeſſion remained with the tenants to whom a recompenſe is annually made by the defendants for the injury done to the ſoil by the waggon way. It is obſervable alſo that the dean and chapter could not grant the ſoil to the defendants; therefore nothing but a mere eaſement paſſed to them, which in *R.* v. *Jolliffe* was expreſsly holden not to be liable to be rated to the poor.

Lord KENYON Ch. J. I entirely agree with the opinion given in the caſe of *R.* v. *Jolliffe*; but this caſe is very diſtinguiſhable from that. The queſtion here is not reſpecting the quantum of

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(*a*) *Ante*, 2 vol. 90.

the rate, but merely whether the defendants are or are not *poſſeſſed* of property that is rateable to the poor; and on that point there can be no doubt. One ground of argument is that, becauſe the dean and chapter could only grant a way-leave, therefore nothing more than a way-leave paſſed to the defendants: but we are not to enquire into the titles of the occupiers. If a diſſeiſor obtain poſſeſſion of land, he is rateable as the occupier of it. Without going through the different parts of the caſe which ſhew an occupation of the ground by the defendants, it is ſufficient to ſay generally that they clearly appear to be the occupiers. Therefore I am of opinion that the order of ſeſſions muſt be confirmed.

ASHHURST J. of the ſame opinion.

GROSE J. It is impoſſible to read this caſe without ſeeing that the defendants have the excluſive occupation of this ground. It is ſtated in the caſe that the defendants have encloſed the ground, of the extent of five or ſix acres, thereby excluding "the leſſees of the dean and chapter and their undertenants as well as all other perſons;" that they have placed gates acroſs the way, erected a bridge, and built two houſes on it which are occupied by the ſervants of the defendants. They were therefore properly rated as the occupiers of this ground.

LAWRENCE J. of the ſame opinion.

Order of ſeſſions confirmed.

JORDAINE *againſt* LASHBROOKE and Another.

Thurſday, May 10th.

In an action by an indorſee of a bill of exchange againſt the acceptor, the latter may call the payee as a witneſs to prove that the bill was void in its creation.

THIS was an action againſt the defendants as acceptors of the following bill of exchange; "*Hamburgh* 30th *December* 1796 for 100*l.* At three uſances pay this my firſt bill of exchange to the order of Meſſrs. *J. Thynne* and Co. 100*l.* Sterling. value in account, and place it to account of *G. W.* as adviſed by *David Hinr Meijer.* To Meſſrs. *T. Laſhbrooke* and ſon *London*;" which was accepted by the defendants, and indorſed by *Thynne* and Co. The declaration alſo contained the common money counts. At the trial at the fittings at *Guildhall* after the laſt term before Lord *Kenyon* Ch. J. *Thynne* was called by the defendants to prove that the bill, though dated at *Hamburgh*, was in fact drawn in *London*, in which caſe it could not be received in evidence it not being ſtamped. On the part of the plaintiff it was objected that it was

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not competent to the defendants, who had accepted the bill, to produce any evidence to ſhew that the bill was void in its creation, and if it were that *Thynne* the payee and indorſer was not a competent witneſs to prove that fact. Lord *Kenyon* overruled the objection. The jury found that the bill was drawn in *London*, and at firſt gave a verdict for the defendants, but by Lord *Kenyon*'s advice they afterwards found a verdict for the plaintiff, ſubject to the opinion of this Court on the above point; and the plaintiff took a verdict on the money counts only.

Nolan on a former day in this term obtained a rule, calling on the defendants to ſhew cauſe why there ſhould not be a new trial, on the ground that the evidence given on the part of the defendants was inadmiſſible. This rule was moved for with a view of enabling the plaintiff to recover on the bill.

Bayley at the ſame time made a croſs motion, to enter a nonſuit, on the ground that if the evidence given by the defendants were properly received, the plaintiff was not entitled to recover, inaſmuch as there was no evidence whatever on the part of the plaintiff but the bill of exchange.

Both theſe rules now came on together, and were argued at length and with great ability by

Erſkine, *Garrow*, and *Bayley*, for the plaintiff, and by

Mingay, *Nolan*, and *Taddy*, for the defendants: but as the caſes cited and the points made at the bar were afterwards taken notice of by the Bench, the arguments are here omitted. In the courſe of the argument it ſeemed to be admitted that, if the bill of exchange were inadmiſſible in evidence, the plaintiff could not recover on the common counts, there being no other evidence to ſupport the plaintiff's demand but the bill.

Immediately after the argument Lord *Kenyon* gave his opinion: but the other judges deſired to conſider of the caſe, and did not deliver their opinions until a ſubſequent day in the term.

Lord KENYON Ch. J. As no other evidence was given by the plaintiff but the bill of exchange, the only queſtion is, Whether the bill were or were not admiſſible in evidence, it not being ſtamped? If it were made in this country, there is no doubt but that it ought to have been ſtamped. The queſtion for our conſideration is, Whether it was proved by competent evidence that the bill, which profeſſed to be a foreign bill and to have been drawn at *Hamburgh*, was really drawn in *England*? The caſe has been argued moſt ably, and every topic has been brought forward on on the part of the plaintiff that bears upon the point; but ſtill I have a very ſtrong opinion upon this queſtion, which I wiſh to deliver now leſt it ſhould be ſuppoſed that I entertain doubts upon it.

The propoſition attempted to be eſtabliſhed by the plaintiff is this, that for ſome technical reaſon or for ſome reaſons of policy a court of juſtice muſt ſhut its ears and not ſuffer facts to be diſcloſed which may be laid before them by a witneſs who is not infamous in his character and who has no intereſt in the cauſe. If the law be ſo, there is ſome novelty in it. I have always underſtood the rule to be that where a witneſs is infamous and his record of conviction is produced, or where he is intereſted in the event of the cauſe, he cannot be received: but to carry the rule beyond that would be extending it farther than policy, morality, or the intereſts of the public require. The rule contended for by the plaintiff is this, that "however infamouſly you (the defendant) have been uſed, whatever fraud may have been committed on you, whatever may be the rights of other perſons, if I (the plaintiff) the party to the fraud can get on the inſtrument the name of the perſon who may be the only witneſs to the tranſaction, I will ſtand entrenched within the forms of law, and impoſe ſilence on that only witneſs, though he be a perſon of unimpeachable character and not intereſted in the cauſe." But I cannot conceive on what ground ſuch a propoſition can be eſtabliſhed. It is contradicted by every hour's experience; it would tend to ſhew that a party to an inſtrument ſhall not be permitted to conteſt the validity of it in a court of law, not only by his own evidence, but by any evidence whatever. But in actions brought on bills of exchange and notes of hand, it is permitted to the defendant to ſhew that the bill or note was given on an uſurious or a gaming conſideration; that is proved by every day's experience. Then the general propoſition is not true. But does the policy of allowing ſuch a defence to be made apply to this caſe as ſtrongly as to thoſe? Preciſely the ſame. And not finding any caſe prior to that of *Walton* v. *Shelley* (*a*) in which ſuch a defence was excluded, I cannot bring my mind to accede to the authority of that caſe. This is one of the moſt important queſtions that can be diſcuſſed; on the rules of evidence depend thoſe facts which are introduced in every caſe, and therefore it is of the utmoſt importance to preſerve thoſe rules.

(*a*) *Ante*, 1 vol. 296.

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rules. It has been argued that the defendant is eſtopped in this caſe: but eſtoppels are odious, and ought not to be extended farther than the law has already carried them; the word "eſtoppel" does not apply to ſuch a caſe as the preſent. When the drawee accepts a bill, he admits that the bill was ſigned by the perſon by whom it profeſſes to have been made, but he does not thereby admit that the holder of the bill is in a condition to enforce payment of it. Moſt of the caſes cited I admit to be law. That of *Bent* v. *Baker* (*a*) is of great authority; it came here by a writ of error from the court of Common Pleas, and though a writ of error was afterwards brought to reverſe our judgment it was at length abandoned. But I wiſh to correct an expreſſion imputed to me in the report (*b*) of that caſe, "that where a perſon has ſigned a negotiable inſtrument, he ſhall not be permitted to invalidate it by his teſtimony;" becauſe having frequently weighed this ſubject in my mind and having not only entertained a contrary opinion but having alſo always acted upon that opinion at niſi prius, I think I never could have uſed the expreſſion imputed to me. The caſe of inſtrumentary witneſſes cannot, in my opinion, be diſtinguiſhed from the preſent; and if not, there is abundant authority in ſupport of my opinion. Sir *J. Jekyll* permitted the ſubſcribing witneſſes to a will to give evidence to impeach the will, and the ſame thing was done in *Lowe* v. *Jolliffe* (*c*). It was then contended by the plaintiff in this caſe that policy required that the evidence offered by the defendant ſhould be excluded: but it appears to me that there is at leaſt as much policy in admitting it; for the conſequence of admitting ſuch evidence may be only to diſappoint a remedy in a civil action, while the conſequence of excluding it will be to encourage fraud and to authoriſe the perſon who has committed it to rely on his own fraud in a court of juſtice. Conſidering the queſtion therefore in all theſe different points of view, and not finding any caſe prior to that of *Walton* v. *Shelley* againſt the opinion I hold, I cannot give way to that authority great as it is, but I retain the opinion I have invariably expreſſed at niſi prius that it was competent to the defendant to give the evidence offered by him; and there being no other evidence but the bill on the part of the plaintiff I think he cannot recover in this action.

(*a*) *Ante*, 3 vol. 27. (*b*) *Ib.* 34. (*c*) 1 *Bl. Rep.* 365.

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ASHHURST J. This is an action on a bill of exchange, which on the face of it appears to be drawn at *Hamburgh*, when in fact it is ſaid it was drawn in *London*, and by a late act of parliament ought to have had a ſtamp, the want of which vitiates the bill. The bill was drawn by *A.* payable to *B.*, and by him indorſed to *C.* *B.* the payee was called as a witneſs to prove that the bill was in fact drawn at *London;* and the queſtion is whether he was a competent witneſs for that purpoſe. In queſtions of this kind which are of ſuch daily occurrence as the rules of evidence are it is much to be wiſhed that general rules ſhould be laid down which would be a polar ſtar to ſteer by, and would be applicable in their principle to all caſes: for if each caſe is to depend merely on the ſuppoſable bias that the exiſting circumſtances under diſcuſſion may be likely to produce upon the mind of the witneſs adduced, it is ſo vague and fanciful a criterion as can never be a guide in other caſes that may happen, and has occaſioned the numberleſs contrarieties of determination that appear in our books. It ſeems to me that there is no ſubject in which ſuch general principles ſeem to be more wanted than in what concerns the paper currency of this kingdom. The great ſource of the flouriſhing ſtate of this kingdom is its trade and commerce, and paper currency guarded by proper regulations and reſtrictions is the life of commerce: and I cannot but think that it might be very detrimental to the commerce of this kingdom and to paper credit if men after they have put their names upon a bill of exchange, and by that means as far as in them lay given it a credit and a currency in the world, ſhould be permitted to annul their own act, to practiſe a fraud upon the world, and to give the lie to what they have atteſted, and thereby overturn their own ſecurity. Theſe inſtruments are in their nature meant for public circulation, and to paſs from hand to hand; and every man who puts his name upon them pledges his faith to the public that all the circumſtances appearing on the face of them are true. And if any rule or principle has been laid down by a court of competent juriſdiction that may give a greater ſecurity to and confidence in this ſpecies of ſecurities I ſhould be ſorry to ſhake ſuch authority. The authority that I allude to is the caſe of *Walton* v. *Shelley* (*ante*, 1 vol. 296.) which was determined when that noble lord preſided in the court whoſe abilities all the world confeſſed, and in which moſt of the caſes on the ſubject were canvaſſed. The

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general principle of the determination was that no perſon is a competent witneſs to impeach a ſecurity which he himſelf has given or given a ſanction to. [Here Mr. Juſtice *Aſhburſt* read the report of Lord *Mansfield*'s judgment in that caſe (p. 300).] The maxim of the civil law, upon which his lordſhip in part grounded his opinion, viz. quod nemo allegans ſuam turpitudinem ſit audiendus, ſeems to carry great weight in it in all caſes: but in regard to theſe inſtruments which are meant for public circulation, and which are taken entirely upon the credit of the names that appear upon them, it ſeems more peculiarly unfit that they ſhould be admitted to impeach their own ſecurities, and appear as witneſſes againſt the man who took the inſtrument upon the faith of their atteſtation. But it has been argued that it would alſo be deſtructive to the public revenue if ſuch witneſſes were not to be allowed to ſhew a fraud committed upon it, and that it would hold out a temptation to ſuch frauds. It would certainly be matter of regret if ſuch a conſequence were to enſue: but it is to be remembered that at the time when the abovementioned caſe was decided, and which determined what the law then was, this ſtamp duty was not impoſed; and the ſubſequent act impoſing a ſtamp duty on bills of exchange could never have been intended to operate as a repeal of any general law of evidence before eſtabliſhed, and therefore cannot fairly be brought into the diſcuſſion. But if it were neceſſary to ſay any thing upon that topic, it ſeems to me not to follow as a neceſſary conſequence that, becauſe a man ſhall not be permitted to break his faith with the public, and deſtroy that inſtrument which he had pledged his name to ſupport, he ſhall not therefore be a competent witneſs for the crown on an indictment for a conſpiracy to defraud the public revenue, or on any other remedy that the crown might take for the recovery of the duty. This is no breach of public faith, and the party might be fully competent to prove the fact, becauſe ſuch evidence would be given diverſo intuitu; as in an action for an aſſault the party cannot be a witneſs for himſelf, but he may be a witneſs on an indictment for the ſame aſſault which is at the ſuit of the crown. This ſeems to obviate the argument founded on the ſuppoſed detriment which might ariſe to the public revenue from admitting the objection to the competency of the witneſs in this caſe. On the whole I am of opinion that the witneſs was not competent to be received.

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Grose J. In this caſe two queſtions have been made, the one upon the ſubject matter of the defence, the other upon the competency of the witneſs. I will firſt conſider whether it is competent to the defendant to prove that which he ſtates as his defence, namely, that the bill was not drawn at *Hamburgh* as upon the face of it it imports, but in *England*, and therefore it ought to have been ſtamped to enable the plaintiff to recover upon it. If that defence be open to the defendant, I will ſecondly conſider whether the witneſs tendered be competent in law to prove it. 1. The firſt queſtion ariſes on the ſtatute 31 *Geo.* 3. *c.* 25. *ſ.* 2. and *ſ.* 19. *Sect.* 2. enacts "that for every piece of paper upon which "*any* bill of exchange ſhall be written, where the ſum payable "thereby ſhall amount to 40*s.* there ſhall be charged a ſtamp "duty of 3*d.*; where it ſhall exceed 30*l.*—6*d.*; and if it exceed 100*l.*—1*s.* 6*d.*" *Sect.* 19. ſays that "No bill of exchange "liable to the duties by this act impoſed ſhall be pleaded or given "in evidence in any court, or admitted in any court to be good "uſeful or available in law or equity, unleſs the paper on which "it is written ſhall be ſtamped with a lawful ſtamp." In this caſe a bill of exchange for more than 40*s.* was offered in evidence, which under this clauſe ought to have been ſtamped, but which had no ſtamp. The objection was made; to which it is anſwered that a bill of exchange in the ſtatute means a bill of exchange drawn in *England*, and that this imports to be drawn at *Hamburgh*, and therefore need not be ſtamped. I do not know that this reaſoning is quite correct; but for my preſent purpoſe it is not neceſſary to diſpute it. I mean by this that ſome argument may be neceſſary to ſhew that the mere writing *Hamburgh* or any other foreign place on a bill of exchange is even primâ faciê evidence upon this ſtatute to ſhew that it was drawn there. I will ſuppoſe however that it was: at the ſame time it will be admitted that at moſt it is but primâ faciê evidence; for if it be concluſive there is an end of the ſtatute and its proviſion, as then every bill of exchange and promiſory note would be dated from ſome foreign place, and upon that ground be exempt from having a ſtamp. If it be not concluſive evidence, the defendant avers and offers to prove that it was drawn in *England* and not at *Hamburgh*. The plaintiff objects that it is not competent for the defendant to aver or prove this fact, for that by his acceptance of the bill he admits all that is contained on the face of it to be true, *i. e.* that it was

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drawn at *Hamburgh* by the perſon whoſe name appears as drawer, of which the acceptor had notice, payable to the payee; and therefore that it need not be ſtamped. If that be ſo, the clauſes in the ſtamp act become nugatory; for if the defendant becauſe he is acceptor may not be heard to ſay this, neither can the drawer, nor the indorſers; neither can the drawer or indorſer of a promiſſory note; and ſo ſuch a determination would be to a certain degree a repeal of the ſtatute. But that can never be law: on the contrary it ſeems to me that when the Legiſlature enacts that every bill of exchange ſhall be ſtamped, and that no bill of exchange ſhall be pleaded or given in evidence that is not ſtamped, it neceſſarily authoriſes the parties concerned, and calls upon courts of juſtice where it is offered in evidence, to inquire whether it be ſuch a bill as ought to be ſtamped, and to hear evidence by legal competent witneſſes to prove that it ought, let the objection be made by whatever perſon it may be, be his name upon the bill or not. The very purpoſe of the clauſe is to make it the intereſt of every perſon concerned in the negotiation of the bill to object and to compel the Court to hear and inquire into the ground and validity of the objection; otherwiſe it would have been ſufficient to have inflicted a penalty on the parties to the fraud on the revenue, as is done in the 17th ſection. Therefore it ſeems to me that this is a good defence in the mouth of the defendant, and that the Court if called upon are bound to inquire into the fact, whether it were, in the words of the ſtatute, "written upon ſtamped paper?"

If they be, the next queſtion is, 2dly, can a man whoſe name is on the bill be a witneſs for that purpoſe. There is no objection to his competence on the ground of intereſt or other diſability, ſuch as conviction of any infamous crime &c. The ſingle objection made is that he is a payee and indorſer. If upon this ground alone he is determined to be incompetent, we ſhall almoſt as effectually repeal the ſtatute as if we had ſaid that the objection ſhall not be made by this defendant; inaſmuch as the perſons whoſe names are upon a bill will in many nay in moſt caſes, (and if once determined that they are inadmiſſible witneſſes probably in all,) when a fraud is intended on the revenue, be the only perſons let into the ſecret and enabled to give evidence of it. Before the caſe of *Walton* v. *Shelley* I never read of this ground of incompetence; the ground is that a man ſhall not diſcloſe any fact that may invalidate an inſtrument which he has ſigned. And why

may

may he not diſcloſe a fact which, if true, it is his duty to the public to diſcloſe? Becauſe, it is ſaid, he has given currency to the bill by putting his name upon it, and he ſhall not be permitted to impeach his own title. If he has ſo done, he has done a very illegal and improper act, and committed a fraud upon the public: if by his aſſiſtance the law has been violated, and the revenue defrauded, he owes to the public by way of retribution a diſcloſure of the circumſtances and the parties, that the ſcheme to rob the revenue may be fruſtrated, by preventing the parties to it recovering that upon the bill which it was intended by the Legiſlature they ſhould not recover, as a puniſhment for violating the law, and as a ſecurity for carrying the act of parliament into execution. But it is ſaid he ſhall not impeach his own title. If that were true in the common caſes of property, I ſhould ſay that upon this act of parliament this caſe muſt be a neceſſary exception from the rule: but the caſe of *Title* v. *Grevett* in 2 Ld. *Ray.* 1008. is in point to ſhew that a man may be a witneſs to impeach his own title; for it was there ruled that a man who conveys lands may be a witneſs to prove that he had no title, becauſe that is ſwearing againſt himſelf; but he is not compellable to give ſuch evidence. But it is ſaid homo allegans turpitudinem ſuam non eſt audiendus. This as a maxim applied to parties in a cauſe may in ſome caſes be true; but there if both are participes criminis the rule applies potior eſt conditio defendentis. A man ſhall not ſuſtain an action upon a ground which proves him guilty of a breach of the law. So a man ſhall not recover money due upon an illegal conſideration, ſuch as uſury, gaming, ſmuggling, or the like. But this rule does not extend to ſhut the mouths of witneſſes guilty of criminal actions; if it did, witneſſes daily received in courts of juſtice, and whom the policy of the law invites to come forward, muſt be rejected; ſuch as accomplices and others concerned in illegal tranſactions. This claſs of men, as I ſaid before, the policy of the law invites to diſcloſe all they know, leaving their credit to the wiſdom and diſcretion of a jury. In the caſe of the King v. *Atwood* and *Robins*, who were indicted for robbery at the Summer aſſizes for *Somerſetſhire* 1787 before *Buller* J., the priſoners were convicted on the teſtimony of an accomplice unconfirmed by any other witneſs as to their identity; and the conviction was afterwards holden good by the judges. And this was not new law, nor founded upon a new principle; for in 1 *Hale*, 303, 304, and 305, there are different inſtances of convictions on the evidence of accomplices; one in 1672 of a conviction of *Hyde* and others of a robbery on the highway on the teſtimony of one who was a party in the robbery but not indicted. The caſes cited for the defendant ſhew clearly what the policy of the law is, and that a man's guilt in the tranſaction diſcloſed, if he be not rendered infamous by conviction and on that account incompetent, is not an objection to his teſtimony. That ſuch evidence may affect paper currency is true; but that objection ought not to alter the rules of law. A man who takes a bill muſt know from whom he takes it; and if this determination will make men more cautious and prudent and thereby prevent their falling into ſnares of this ſort, it will be of uſe. In the preſent caſe let the plaintiff reſort to his indorſer to recover back the conſideration he gave for the bill. And if eventually ſome puniſhment ſhould fall on either of the perſons who were the firſt parties to the tranſaction, the object of the law will be attained; and men will take care how they receive an unſtamped bill, and inquire whence it came and where it was drawn. Upon theſe grounds I think that the plaintiff is not entitled to recover.

LAWRENCE J. In this caſe there were two queſtions; firſt, whether the indorſer of a negotiable ſecurity can be received as a witneſs to impeach the validity of the inſtrument he has put into a courſe of circulation, though he has no intereſt; 2dly, whether the acceptor of this bill of exchange ſhall be allowed to contradict what appears on the face of the bill, and thereby prevent the holder recovering.

The caſe of *Walton* v. *Shelley* is undoubtedly a caſe of great authority: but it was admitted in the courſe of the argument that no ſuch determination is to be found earlier than that caſe; therefore it muſt depend on its being ſupported by the general principles and rules of law applicable to the admiſſibility of witneſſes. Now I find no rule leſs comprehenſive than this, that all perſons are admiſſible witneſſes who have the uſe of their reaſon and ſuch religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by intereſt. What credit will be due to them will depend on a great variety of circumſtances and muſt be decided on by the jury; and I am not aware of any caſe ſolemnly decided, except that of *Walton* v. *Shelley*, in which a witneſs has been rejected as incompetent but upon the ground of ſome exception which may be claſſed under one or other of theſe heads. Under none of theſe claſſes does the witneſs in this caſe fall; and the conſtant practice of examining accomplices and what has been done in other caſes alluded to, (that of a witneſs to a forged will who has obtained probate,) ſhew that the mere circumſtance of a man's repreſenting himſelf as having done things inconſiſtent with common honeſty is not ſufficient to reject his teſtimony, however it may weaken and impeach it. Nor is there any diſtinction with reſpect to negotiable ſecurities, when the point to be conſidered is the *competency* of the witneſs; for ſuppoſing what he has done in putting ſuch inſtruments into circulation to be ever ſo great a fraud and ever ſo miſchievous, he ſtill is a witneſs unconvicted of any crime, and without intereſt, and not more devoid of principle than many who have been mentioned as being conſtantly admitted. Whether a defendant ſhall be allowed to ſet up ſuch a defence is quite another conſideration than whether the witneſs be competent. If the matter may be proved by a witneſs not a party to the bill, how can a defendant, not eſtopped to make ſuch defence, be deprived of the teſtimony of a witneſs called to eſtabliſh a defence which the law allows who is neither intereſted or infamous? It certainly is of conſequence to prevent men hanging out falſe colours; but this rule muſt be applied to the parties in the cauſe, or you may prejudice men who have not hung out ſuch colours.

As to the ſecond point; There is a diſtinction between negotiable and other ſecurities. Where the queſtion ariſes between the immediate parties to any inſtrument or thoſe who ſtand in their place, as is the caſe where the inſtrument is not negotiable, the rule is that in pari delicto potior eſt conditio poſſidentis; and perſons are continually allowed ſuam allegare turpitudinem, as in caſes of ſimony, compounding felony, ſale of offices &c; and poſſibly that maxim may in our law be confined to the caſes of plaintiffs making demands ex turpi cauſâ and to ſuch caſes of defence in which innocent perſons may be prejudiced. In the caſe of negotiable ſecurities the general rule moſt undoubtedly is that the bonâ fide holder of a note or bill has nothing to do with the tranſaction between the original parties: but this rule has its exceptions; uſury, gaming, infancy may all be ſet up. It cannot be denied but that allowing this defence may have its miſchiefs and inconveniences and tend much to weakening the credit of notes, but on the other hand if it be not allowed the proviſions of a ſtatute on which a conſiderable part of the revenue depends

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would be entirely eluded; and it is better that a private miſchief ſhould happen to ſome individuals than a public loſs. The defendant in this caſe has no merits; to him it muſt be the ſame thing whether the bill were drawn in one place or another; and were it not on account of the public diſadvantages it would (I think) be very queſtionable whether the acceptor of a bill of exchange ſhould be allowed to ſay that a bill, of which by the acceptance he has admitted that he was adviſed, was not drawn at the place where it purports to have been drawn. An acceptor is only prevented controverting the hand-writing of the drawer from the miſchievous conſequences of men giving credit by their acceptances and then controverting that which muſt be ſuppoſed to be in their knowledge; and this applies to every fact which the acceptance admits. But in this caſe the queſtion is to be decided by conſidering which of two evils is to be ſubmitted to. Whether the indorſer or drawer can ſet up any defence to an action on this bill I do not feel it neceſſary to ſay: but I think no great miſchief is to be apprehended from the poſſibility of dating bills abroad, when drawn here, in order to defraud; for if that purpoſe were clearly eſtabliſhed, I think the parties to ſuch a fraud would run a riſk which few men are hardy enough to venture on.

Per Curiam, The rule for a new trial diſcharged.
The rule to enter a nonſuit abſolute.

Friday, May 10th.

Sir A. S. Hammond Bart. and Others *againſt* Toulmin and Kendrick.

A. ſold a ſhip to *B.* with a covenant that he had a good title though in fact he had none; afterwards *B.* became a bankrupt, and *A.* ſuſtained damage by paying the value of the ſhip to the true owner; held in an action on the covenant by *A.* againſt *B.*, ſtating the ſpecial damage, that *B.*'s certificate was no bar.

This was an action of covenant brought by the plaintiffs, who are commiſſioners of the navy. The firſt count in the declaration ſtated that on the 26th of *October* 1795 the defendants, agents to the captors of the *Dutch* frigate, the *Alliance*, in conſideration of 6741 *l.* 3 *s.* 4 *d.* by deed conveyed the ſaid frigate to the plaintiffs, and thereby covenanted that they had full power and lawful authority to ſell the ſame to the plaintiffs free and clear of and from all former charges and incumbrances &c; that the plaintiffs accordingly took poſſeſſion of the ſhip &c; but that the defendants had not full power and authority to ſell the ſame, for that the ſhip and ſtores at the time of making the ſaid deed be-

longed

longed to the King, who by a warrant dated the 30th of *May* 1797 (after reciting that the *Alliance* had been taken as prize on the 22d of *Auguſt* 1795 by the King's ſhip the *Stag* commanded by Captain *J. Yorke*, in company with three other ſhips, and had been ſold to the lords commiſſioners of the Treaſury for the public ſervice, and that the commiſſioners of the Treaſury had recommended it to the King to grant the proceeds of the ſale of the ſhip and cargo to the captors) authoriſed the commiſſioners of the Treaſury to pay the proceeds of the ſale to the officers and crew of thoſe four ſhips; that thereupon *F. Edgecombe* as attorney for and on behalf of the officers and crew of the ſhip *Stag* claimed the ſhare of the ſaid ſhip, which amounted to 2000 *l.*, belonging to the ſhip (the *Stag*), which ſum the plaintiffs became liable to pay and did pay to the ſaid *Edgecombe*, but that the defendants had refuſed to pay the ſame to the plaintiffs, contrary to their covenant &c. The ſecond count was ſimilar to the firſt, except that it alleged that the prize money was demanded by and paid to the officers and crew of the *Stag*, inſtead of their attorney. The third count, after ſetting forth the ſale of the ſhip by the defendants to the plaintiffs for 6741 *l.* 3 *s.* 4 *d.*, with the covenant &c, ſtated that the defendants had not full power and authority to ſell the ſame &c, for that the ſame belonged to and was the property of the King, and that the defendants had not paid to the plaintiffs the ſaid purchaſe money &c.

The defendant *Toulmin* pleaded (inter alia) that after the ſeveral cauſes of action in the declaration mentioned accrued againſt him, and before the exhibiting of the bill, to wit on the 27th of *February* 1796, he became a bankrupt, and that the ſaid ſeveral cauſes of action accrued againſt him before he became a bankrupt.

To this plea there was a ſpecial demurrer, becauſe this action founded in damages only and was not a liquidated certain demand &c.

Dampier, in ſupport of the demurrer, contended that the damages on the breach of this covenant were not ſo liquidated that they could be proved under the defendant's commiſſion of bankrupt. This action is not brought for a liquidated demand immediately conſequent on the accruing of the cauſe of action, but the quantum of the damages might be varied by ſubſequent circumſtances, and therefore could not be proved on the accruing of the cauſe of action; nor can they now be aſcertained without the inter-

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intervention of a jury. This is not like thoſe caſes where the queſtion has been whether any cauſe of action ſubſiſted before the bankruptcy, or thoſe where the form (*a*) of the action is deciſive; nor is it like thoſe of covenant for non-payment of rent or of a ſum certain due before the bankruptcy, where the ſum to be recovered is a fixed ſum, aſcertained immediately on the accruing of the cauſe of action, and to which the creditor can ſwear before the commiſſioners. Here a cauſe of action ſubſiſted before the defendant's bankruptcy, accruing on the execution of the deed, immediately after which the plaintiffs might have maintained an action, *Gliniſter* v. *Audley*, Sir *T. Raym.* 14.: but in that caſe they could only have recovered nominal damages; they could not have waved the contract, as in *Dutch* v. *Warren* (*b*), and have proved a debt under the defendant's commiſſion as for money had and received, becauſe this was for a breach of contract under ſeal. In *Utterſon* v. *Vernon* (*c*) *Aſhhurſt* J. ſaid "It is a general rule that nothing is proveable under a commiſſion that cannot be recovered in the form of an indebitatus aſſumpſit; and wherever it is neceſſary to have recourſe to a ſpecial action on the caſe, or treſpaſs, to recover damages, the party cannot come in under the commiſſion." And *Buller* J. ſpeaking of an action for not delivering goods according to an agreement, ſaid "If the party has actually paid for the goods, there he may recover the preciſe value in caſe of non-delivery, and conſequently may prove it as a debt under the commiſſion: but if he will not be content with recovering the preciſe value of them, but goes for contingent damages ariſing from the fluctuation of the market, he cannot come in under the commiſſion becauſe thoſe damages are uncertain." So in this caſe the plaintiffs had their election; they might have recovered nominal damages from the defendants immediately after the execution of the deed, or they were at liberty to wait until they ſuſtained particular damage ſubſequently by paying the value of the ſhip to the captors under the King's warrant and then recover ſuch ſpecial damage againſt the defendant on his covenant: but inaſmuch as that damage did not ariſe until after the defendant's bankruptcy, his certificate is no bar to the plaintiffs' claim. But even if the plaintiffs had a cauſe of action before the defendant's bankruptcy, they could not have proved any preciſe debt under the commiſſion, for the

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(*a*) *Goodtitle* v. *North*, *Dougl.* 562.; *Parker* v. *Norton*, *ante*, 6 vol. 695.

(*b*) 1 *Str.* 406; and cited in 2 *Burr.* 1010.

(*c*) *Ante*, 3 vol. 547.

damages

damages were uncertain and could only be aſcertained by a jury; as where damages ariſe on the breach of a covenant for building; *Baniſter* v. *Scott*, *ante*, 6 vol. 489. The ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 7., which enables a defendant to plead that the cauſe of action aroſe before his bankruptcy, diſcharges him from all *debts* due before: now the words of the ſtatutes of ſet-off uſe the ſame word "debt," and the conſtruction that has obtained on the latter may fairly be applied to the former. But in *Weigall* v. *Waters* (*a*) it was holden that the leſſee could not ſet off any uncertain damages, to which he might be entitled under a covenant by the landlord to repair, in an action brought by the landlord for rent. The caſe which comes neareſt to this is that of *Chilton* v. *Whiffin* and another (*b*), where in conſideration that the plaintiff would accept a bill of exchange drawn on him by the defendants they promiſed to indemnify him: after the bill became due the defendants became bankrupts, and after their bankruptcy the plaintiff was ſued upon the bill and charged in execution: and it was holden that the plaintiff's action upon the defendants promiſe of indemnity was not barred by their certificate; for though a cauſe of action exiſted before the bankruptcy, the plaintiff was not actually damnified till afterwards. There too the quantum of the damage ſuſtained before the bankruptcy was at leaſt as eaſy to be aſcertained as in the preſent caſe.

Gibbs for the defendant. It muſt be taken to be admitted on the record that the whole of the plaintiffs' cauſe of action aroſe before the bankruptcy of the defendant, and conſequently they might have proved their demand under the defendant's commiſſion. They do not ſeek to recover any conſequential damage. And though in the firſt and ſecond counts the ſum claimed is that paid to the officers and crew of the *Stag* after the 30th of *May* 1797, it is alleged in the plea that *after* the ſeveral cauſes of action the defendant became a bankrupt; the mention of the 27th of *February* 1797 as the day when the defendant became a bankrupt is immaterial, becauſe it is laid under a videlicet. If the plaintiffs had wiſhed to deny that fact, they ſhould have taken iſſue on it, inſtead of which they have demurred, thereby admitting the truth of the plea, namely, that the defendant became a bankrupt after all the cauſes of action accrued. This has been compared to the caſe of an action brought for not delivering goods when the vendee had paid for them: now according to that compariſon

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(*a*) *Ante*, 6 vol. 488.

(*b*) 3 *Wilſ.* 13.

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pariſon the plaintiffs cannot maintain this action. The defendant ſold a ſhip to the plaintiffs with a warranty of title, and it afterwards turned out that the defendant had not a good title: the plaintiffs might either have immediately recovered the purchaſe money back, or they might afterwards have recovered back all the money that they had expended on her or any other conſequential damage: but they only demand the conſideration money paid for the ſhip; and as this was a debt that accrued before the bankruptcy of the defendant, it might have been proved under his commiſſion. The cauſe of action ſet forth in the third count clearly exiſted before the defendant's bankruptcy; for in that the breach aſſigned is the non-payment of the purchaſe money to the plaintiffs.

Dampier in reply. The fallacy in the defendant's argument conſiſts in this, in confounding the term "cauſe of action" with "the damages" claimed by the plaintiffs ariſing from a breach of the defendant's covenant as ſet out in the two firſt counts. The cauſe of action indeed aroſe the inſtant the deed was executed, which was before the defendant's bankruptcy: but the damages ſuſtained by the plaintiffs, as ſtated in the two firſt counts, did not ariſe until after, and conſequently could not have been proved (even if they were liquidated damages) under the commiſſion. And as the defendant's plea is pleaded to all the counts in the declaration, if it be not a legal anſwer to any one count it is a bad plea and cannot be ſupported.

Lord KENYON Ch. J. It is extraordinary that no caſe preciſely ſimilar to the preſent ſhould ever have been brought before the Court until now. I am clearly of opinion that the defendant's certificate has not delivered him from this demand. There are caſes without number to ſhew that a certificate does not deliver the bankrupt from every contract entered into before his bankruptcy: it is eſtabliſhed beyond all doubt that if he take a leaſe and covenant to pay rent and is then ſtripped of all his property by his bankruptcy ſo that he has no fund to which he can reſort, yet he is liable for the rent in an action on his covenant made before his bankruptcy. So when the action ariſes ex delicto before the bankruptcy, the plaintiff need not go before the commiſſioners of the bankrupt (defendant) to receive a ſatisfaction, but he may bring his action, to which the defendant's certificate will be no bar. The Legiſlature only meant that thoſe demands that were incurred before the bankruptcy and which were liquidated

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debts ſhould be proved under the commiſſion. But here was no debt that could be proved under the defendant's commiſſion; the whole reſted in damages, and the plaintiffs have a right to appeal to a jury to aſcertain what is due to them for damages for the breach of this covenant. On ſuch an appeal the jury will have an opportunity of enquiring into all the circumſtances of the caſe; they may ſee reaſon not to give damages to the full extent of the price paid for the ſhip, but apportion the damages according to the injury really ſuſtained. Therefore I think the plaintiffs are entitled to judgment on this demurrer.

ASHHURST J. I have always underſtood that, where the plaintiff's demand reſted in damages, and could not be aſcertained without the intervention of a jury, it could not be proved under the defendant's commiſſion: now here was no preciſe ſum due to the plaintiffs at the time of the defendant's bankruptcy. The defendant had indeed been guilty of a breach of covenant at that time: but the jury were to aſcertain the amount of the damages ſuſtained; it was a mere choſe in action.

GROSE J. The ground of the demurrer is that the plaintiffs' cauſe of action is not barred by the defendant's certificate under the ſtat. 5 *Geo.* 2. *c.* 30. The word in that act is "debt:" but this is not the demand of a debt, but of uncertain unliquidated damages. The plaintiffs' counſel has very properly argued by analogy to caſes ariſing on the ſtatutes of ſet-off, where the ſame word "debt" is uſed; and ſuch a demand as the preſent clearly could not have been ſet off in an action brought by the defendant.

LAWRENCE J. The defendant's argument is this, that it is admitted on the record that the cauſe of action aroſe previous to the defendant's bankruptcy, and therefore the defendant's certificate is a bar to this action: but if ſo, it would equally be an anſwer to any action that might be brought for any ſpecial damage ariſing after the bankruptcy, becauſe the cauſe of action accrued from the defendant's ſale of the ſhip without having a title. But we muſt conſider the nature of the contract, and ſee whether a breach of it creates a *debt* within the meaning of the ſtatute that could have been proved under the defendant's commiſſion. In the caſe put of goods ſold but not delivered, the conſideration fails, and then the vendor has received money to the uſe of the vendee. But here is a contract under ſeal; the plaintiffs

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tiffs muſt proceed on that contract, and can only recover damages for a breach of it. The caſe of *Weigall* v. *Waters*, cited by the plaintiffs' counſel, is a ſtrong authority in ſupport of our opinion; for there the defendant had actually paid a ſum of money for repairs, and ſo far it became liquidated damages, and yet it was holden that ſuch damages could not be ſet off againſt the plaintiffs' demand.

Judgment for the plaintiffs.

Friday, May 11th.

DOE on the Demiſe of MEARS *againſt* DOLMAN and Others.

The Court will grant leave to enter the continuances after verdict in order to arrive at the juſtice of the caſe.

AT the trial of this ejectment a verdict was taken pro formâ for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit; which motion was accordingly made and a rule niſi granted on a former day in this term on two grounds; 1ſt, That the leſſor's right of entry was barred by the ſtatute of limitations (*a*); 2dly, By a deſcent caſt.

The firſt objection (the only one in queſtion at preſent) aroſe on the evidence given at the trial, whereby it appeared that *Mary Mears* the grandmother of the leſſor of the plaintiff, and ſiſter to *Thomas Dolman*, from whom both parties claimed, died on the 25th *January* 1771, and that afterwards in the ſpring of the ſame year *Thomas Dolman* died, upon whoſe death the title of the leſſor of the plaintiff accrued, if at all, as heir at law; which was above 20 years ago. The defendant claimed as grandſon and heir at law of that *Thomas Dolman*. But it was ſhewn that that *Thomas Dolman* had a former wife living at the time of his marriage with the defendant's grandmother, and therefore the defendant's father being a baſtard could not take by deſcent. The leſſor of the plaintiff, in anſwer to the objection to his own title to recover on account of the ſtatute of limitations, proved that he was an infant at the time when his title accrued and had not come of age till 1786, after which he had ten years to bring his action; to which the defendant objected that the action was not brought within the ten years, and adverted to the niſi prius record the memorandum of which was of *Hilary* term 1798. Lord *Kenyon* at the trial aſſented to the objection, unleſs it could be ſhewn that

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(*a*) 21 *Jac.* 1. *c.* 16.

the writ was ſued out before the expiration of the ten years and the ſuit continued down to the preſent time, which the leſſor of the plaintiff was not then prepared to do: however it was agreed that a verdict ſhould be taken for him without prejudice, with leave to the defendant to move as above.

But pending that rule another rule was obtained, calling on the defendant to ſhew cauſe why the leſſor of the plaintiff ſhould not be at liberty to amend the plea-roll and record of niſi prius by making them of *Eaſter* term 1792 inſtead of *Eaſter* term 1797. This rule was obtained upon an affidavit ſtating the ſervice of the declaration in ejectment in this cauſe, which was commenced by original on ſome of the defendants, namely, the tenants in poſſeſſion, on the 22d of *March* 1792; that *Dolman* and the reſt of the defendants (who ſtood on the ſame intereſt) in *Eaſter* term 1792 obtained the uſual rule for making them defendants as landlords; and that all the defendants afterwards in the ſame term entered into the common rule to confeſs &c; and then ſtating the reſt of the proceedings in the ſame ſuit regularly down to the time of trial. Againſt this laſt mentioned rule for amending,

Erſkine and *Lawes* now ſhewed cauſe. They chiefly relied on the extreme hardſhip of this caſe againſt the defendant, whoſe father had inherited and died ſeiſed of the premiſes, conceiving himſelf and being conſidered by all his family at the time as legitimately born. And they argued that an application to amend and enter continuances being to the diſcretion of the Court, and not a matter of right, the Court would not lend their aid in ſuch a caſe as the preſent. They admitted that ſince *Morris* v. *Pugh* (*a*), proof of the writ actually ſued out is admiſſible to control the general memorandum of the niſi prius record, but obſerved that here no ſuch evidence was offered. But in *Harris q. t.* v. *Woolford* (*b*) it was alſo holden neceſſary to prove the writ returned in order to ſave the ſtatute of limitations, which could not have been done in this caſe, and the defect of which this rule is intended to ſupply; and therefore the granting of this rule (they contended) would entrench on the ſtatute of limitations. They alſo mentioned the caſe of *Goodtitle* d. *Elton* v. *Church*, *Tr.* 37 *Geo.* 3. in this Court, as a caſe where the Court refuſed to ſet aſide a nonſuit; becauſe for want of ſhewing the true time of ſuing

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(*a*) 3 *Burr.* 1241.

(*b*) *Ante*, 6 vol. 617.

out the writ in evidence at the trial, the action appeared by the general memorandum of the niſi prius record, which referred to the firſt day of the term, to have been commenced before the title of the leſſor accrued, which was in the term.

Gibbs contrà was ſtopped by the Court.

Lord Kenyon Ch. J. The only queſtion here is whether the leſſor of the plaintiff has actually commenced the preſent ſuit in time. In what manner that is hereafter to be made out it is unneceſſary at preſent to inquire. The action was commenced againſt the caſual ejector by original, and notice of the declaration was ſerved on the tenants in poſſeſſion, and the landlord was afterwards admitted to defend upon entering into the common rule. Perhaps there may be ſome difficulty as to the form in which the continuances ſhall be entered ſo as to bind the real parties now before the Court; though I conceive, if it were neceſſary, that the Chancellor would iſſue an original writ applicable to them. But it is ſufficient in this caſe to ſay that there is no inſtance in which the Court have refuſed the parties leave to amend according to the truth of their caſe, to prevent their being barred by the ſtatute of limitations for a ſuppoſed laches of which they really have not been guilty. It is a matter of courſe to grant leave to amend in theſe caſes, to enable the parties to arrive at the real juſtice of the caſe. And in this inſtance I do not ſee that the defendant ſtands in a more meritorious ſituation than the leſſor of the plaintiff.

Per Curiam, Rule abſolute to amend.

Friday, May 11th.

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An author whoſe work is pirated before the expiration of twenty-eight years from the firſt publication of it may maintain an action on the caſe for damages againſt the offending party, although the work was not entered at *Stationers' Hall*, and although it was firſt publiſhed without the name of the author affixed.

This was an action upon the caſe; and the firſt count of the declaration ſtated that the plaintiff was the author of a certain book entitled "Thoughts upon Hunting;" and being ſuch author within the ſpace of twenty-eight years laſt, viz. on &c. at &c. firſt publiſhed the ſaid book; that all the copies of the book ſo by him publiſhed having been ſold, the plaintiff before and at the time of the grievance after mentioned intended to publiſh a new edition and had laid out 100*l.* in preparing the ſame, yet the defendant afterwards and within the ſpace of twenty-

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eight years from the day of the firſt publiſhing of the ſaid book, viz. on &c. at &c. wrongfully and without the plaintiff's leave and againſt his will publiſhed and expoſed to ſale and ſold divers, to wit, four hundred copies of the ſaid book; by means whereof the right title and intereſt of the plaintiff in the ſaid book is much leſſened in value. The ſecond count ſtated that the plaintiff had the ſole and excluſive liberty and right of printing a certain other book called "Thoughts upon Hunting," whereof the plaintiff was and is the author, and which had been within twenty-eight years laſt to wit, on &c. firſt publiſhed by him as ſuch author, yet the defendant knowing the premiſes and contriving to injure the plaintiff afterwards viz. on &c. at &c. wrongfully and unjuſtly and without the plaintiff's leave and againſt his will printed publiſhed and expoſed to ſale and ſold divers, to wit, four hundred copies of ſuch laſt mentioned book, whereof the plaintiff had the ſole and excluſive liberty and right of printing as aforeſaid; by means whereof the right title and intereſt of the plaintiff of in and to ſuch ſole and excluſive liberty and right of printing is much hurt and leſſened in value.

The defendant pleaded the general iſſue; and on the trial at the ſittings for *Weſtminſter* after laſt *Hilary* term before Lord *Kenyon* the jury found a verdict for the plaintiff, ſubject to the opinion of this Court on the following caſe.

The plaintiff is the author of the book ſtated in the declaration, entitled "Thoughts upon Hunting;" and in *May* 1781 he publiſhed the firſt edition of it, without any name prefixed to the title-page. In 1782 he publiſhed a ſecond edition, and in 1784 a third edition with his name prefixed to the title-page. Neither the original or ſubſequent editions were ever entered in the hall of the company of Stationers. In *Auguſt* 1796 the defendant publiſhed the ſame work under the title of "Thoughts upon Hare and Fox-hunting," with the plaintiff's name prefixed to the title-page. The plaintiff is ſtill living, and never diſpoſed of his right or intereſt in the ſaid work. The queſtion for the opinion of the Court is, Whether the plaintiff is entitled to recover in this action?

Reader for the plaintiff. Three queſtions ariſe in this caſe; 1ſt, Whether an action on the caſe for damages will lie ſince the ſtatute 8 *Ann*, *c.* 19.? 2d, Whether, if ſuch action will lie ſince the ſtatute, it can be maintained unleſs the work be entered at *Stationers' Hall* previous to publication? 3d, Whether the plaintiff

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has abandoned his right of property in the work by publiſhing it without affixing his name to it? 1ſt, Admitting that ſince the caſe of *Donaldſon* v. *Becket* in *Dom. Proc.* 1774 (*a*) an author cannot after publication of his work ſet up a common law right to the excluſive printing and republiſhing of it, yet ſuch a right is expreſsly veſted in him by the ſtat. 8 *Ann*, *c.* 19. for the term therein ſpecified, which is not yet expired in the preſent caſe. The firſt ſection of that act, after reciting that printers and others have taken the liberty of publiſhing books and other writings without the conſent of the authors or proprietors to the great detriment of them and their families, enacts that the author of any book already printed who has not transferred to any other the copy of ſuch book &c, or the perſons who have acquired or purchaſed the ſame, *ſhall have the ſole right and liberty* of printing ſuch book &c. for twenty-one years and no longer; and that the author of any book not publiſhed and his aſſigns *ſhall have the ſole liberty of printing and reprinting* ſuch book for fourteen years to commence from the day of firſt publiſhing the ſame and no longer. It then proceeds to affix the penalties for tranſgreſſing the law. By this act therefore the property in literary works is excluſively veſted in the authors for the period aſſigned, independently of the penalties which are afterwards inflicted on thoſe who infringe that property: and the maxim of law attaches that the law confers no right without a remedy to ſecure it, which in this inſtance can only be by an action on the caſe for damages. It will be contended however that the author has no ſuch general remedy in the preſent caſe, becauſe the ſame ſtatute that creates the right has pointed out a particular remedy for the protection of it, namely, by ſuing for the penalties given by the ſtatute in the ſame clauſe. And it muſt be admitted that in general where a ſtatute creates a new offence and gives a penalty againſt the offender no other remedy can be reſorted to; as in 1 *Rol. Abr.* 106. *pl.* 16. But that and all other caſes of the like ſort are founded on ſtatutes which veſt no right in any party, but only prohibit the doing of a certain thing under a penalty. There is no caſe where it has been holden that if a ſtatute veſt a right generally in any perſon, and alſo give a penalty againſt thoſe who infringe that right, the party grieved is confined to that particular remedy. On the contrary it was holden in *Chapman* v.

(*a*) 4 *Burr.* 2408. and 7 *Bro. P. C.* 88.

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Pickerſgill (*a*) that the common law remedy of an action on the caſe for damages lies for maliciouſly ſuing out a commiſſion of bankrupt, although the 5 *Geo.* 2. *c.* 30. *ſ.* 23. gives a particular remedy in that caſe, namely, by enabling the Chancellor, to whom a bond in the penalty of 200 *l.* is given for ſecuring the trader againſt that miſchief, to order ſatisfaction to the party grieved. It might even be admitted that the rule may be carried further, and that wherever a new right is conferred by ſtatute, and a particular remedy given to the party grieved to enforce the obſervance of it, no other remedy can be reſorted to. But here there is no remedy given *to the party grieved*. It is true that the pirated copies are to be forfeited to the proprietor of the copyright; but that is for the purpoſe of their being deſtroyed, and is in itſelf no compenſation for the injury previouſly ſuſtained. There is alſo a penalty of a penny for every ſheet found in the poſſeſſion of the offender, to which without adverting to the inadequacy of it as a remedy the ſame anſwer may be given as before, that it may entirely fail as a compenſation for the injury before ſuſtained by the ſale of the ſpurious copies. But beſides, there is this deciſive anſwer to it, that the remedy, inefficient as it is, and inapplicable in ſome caſes, is not given to the party grieved but to a common informer. Neither is the ſuppoſed remedy commenſurate with the duration of the right conferred; for the penalties only attach upon perſons pirating copies "within the times granted and limited by this act *as* "*aforeſaid*;" the only times before ſpecified being the term of twenty-one years for books then before printed, and the term of fourteen years for books thereafter to be printed: whereas by a ſubſequent clauſe (the 11th) if the author be living at the expiration of the firſt fourteen years the ſole right of publiſhing reverts to him for a further term of fourteen years. Therefore if the party grieved has not this remedy, he has no remedy whatever to protect his right againſt invaſion during the latter period. The opinion now contended for is ſupported by authority as well as reaſon. Mr. Juſtice *Yates*, who in the caſe of *Millar* v. *Taylor* (*b*) in this Court was alone of opinion that an author had not a right of property at common law in his works when publiſhed, was yet decidedly of opinion that by the firſt clauſe of the ſtatute of *Anne* an excluſive right was veſted in the author

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(*a*) 2 *Wilſ.* 145.

(*b*) 4 *Burr.* 2380.

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during the terms therein limited; and that notwithſtanding the penalties and confiſcation given by the ſame act the author had *all the common law remedies* for the enjoyment of that right; for which he cited *Ewer* v. *Jones*, *Salk.* 415. and 6 *Mod.* 26. So in the ſubſequent caſe of *Donaldſon* v. *Becket* (*a*), *Eyre* B., who gave his opinion in the Houſe of Lords againſt the common law right of an author after publication, was yet of opinion that there might be a remedy in equity upon the foundation of the ſtatute, independently of the terms and conditions thereby preſcribed in reſpect of the penalties given. It is admitted that injunctions are granted of courſe in the Court of Chancery to reſtrain printers from publiſhing the work of another perſon; which practice can only be ſuſtained on the ground that the penalties given by the ſtatute are not the only remedy which can be reſorted to. 2dly, It is not neceſſary to the author's right of action in this caſe that the work ſhould be entered at *Stationers' Hall* previous to publication. It is true that the ſecond ſection of the act requires ſuch entry to be made in order to ſubject a defendant to the forfeitures or penalties of the act; but it is only neceſſary for that purpoſe. And there was no occaſion to give notice to the defendant who the author was in order to ſuſtain this action, becauſe he muſt have known that the copyright did not belong to him (*b*); and he admits his knowledge of the author by prefixing his name to the work publiſhed by himſelf. 3dly, There is no pretence for ſaying that the plaintiff by publiſhing the work originally without his name thereby abandoned his right of property to the public; for whether he did ſo or not is a matter of fact which ſhould have been found by the jury and cannot be inferred as a matter of law: and here the caſe ſtates that the plaintiff never diſpoſed of his right or intereſt in the work. *Yates* J. held (*c*) that the inſerting of the author's name in the title page was not neceſſary, ſuppoſing he had the right of property in him; and that in order to make an abandonment there muſt be an intention to relinquiſh as well as an actual relinquiſhment.

Marryat for the defendant. It is admitted that this action is not maintainable at common law independently of the ſtatute: if ſo, that ſtatute having pointed out a particular remedy no other can be purſued. It is a ſettled rule that where a ſtatute creates a new

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(*a*) 4 *Burr.* 2409.

(*b*) Vid. Mr. Juſtice *Aſton*'s argument, *ib.* 2345.

(*c*) 4 *Burr.* 2366.

new offence or gives a new right, and in the ſame clauſe either preſcribes a particular mode of puniſhment or a particular remedy for the infringement of it, no other can be reſorted to. But it is otherwiſe where a ſtatute is merely confirmatory of a pre-exiſting right; in which caſe the new remedy is conſidered only as accumulative. It is ſaid that this rule is confined to criminal proceedings or actions for penalties, and does not extend to caſes of civil remedies for injuries ſuſtained by the party grieved. Yet it appears that the Legiſlature thought otherwiſe in reſpect to property of a ſimilar kind, namely, that of engravings. The 8 *Geo.* 2. *c.* 13. *ſ.* 1. gives the excluſive right in their works for a ſimilar term to engravers as the 8 *Anne* had before given to authors, and affixes the ſame penalties upon the breach of it. The 7 *Geo.* 3. *c.* 38. extends the right to other perſons, and enlarges the term of the monopoly to twenty-eight years. Then the 17 *Geo.* 3. *c.* 57. reciting the two former acts, and their inſufficiency for the protection of the artiſts, and the neceſſity there was for making further proviſion for ſecuring their property, gives to the party injured a ſpecial action upon the caſe to recover damages againſt the party pirating the work. It is evident therefore that the Legiſlature thought that no ſuch remedy as this now attempted lay by virtue of the ſtatutes veſting the excluſive right in the engravers. Next it is objected that the remedy given by the ſtatute of *Anne* is inadequate, and that, ſuch as it is, it is given to a common informer, and not to *the party grieved.* The inadequacy of it was a matter for the ſole conſideration of the Legiſlature. The party grieved may ſue, if he pleaſe, for the penalties. But at any rate that part of the act which requires the forfeiture of the copies themſelves that have been pirated is entirely for the benefit of the author. And as the penalties are given againſt every offender in whoſe cuſtody any part of the work pirated ſhall be found "*contrary to the true intent and meaning of the act,*" that muſt be taken to include the further term of fourteen years granted by the ſubſequent part of the act, as well as becauſe in the former part of the ſame ſection all other perſons than the author or proprietor are prohibited from publiſhing the work within the *times* granted and limited by this act as aforeſaid. [The Court ſaid that the words "*as aforeſaid*" confine the meaning to the two terms of 21 years and 14 years mentioned in the preceding part of the clauſe, and cannot extend to the ſecond term of 14 years which is granted by a ſubſequent clauſe.] As to the caſe cited from 2 *Wilſ.* 145., that went expreſsly on the ground that the action would have lain at common law ſuppoſing the ſtatute had never been made, and therefore that the remedy given by the ſtatute was accumulative. And indeed it could not be doubted but that a party was entitled to a remedy in damages for any injury to his character or fortune, let it ariſe from what cauſe it might. The 2d objection is much ſtronger. The whole frame of the act ſhews that the Legiſlature intended to make it part of the condition of giving the excluſive right to authors to print their works for the times mentioned, that they ſhould enter them in ſome public record, in order that all perſons might be apprized what works they might or might not publiſh. This appears ſtrongly from the third clauſe, which provides that if the clerk of the *Stationers' Company* ſhall not on demand regiſter the copy, the author upon notice thereof in the *Gazette* ſhall have the ſame benefit as if the entry had been made. This ſhews that the Legiſlature conſidered the penalties before given in the nature of a remedy to the author, and not merely for the benefit of a common informer; for that proviſion is excluſively in favour of the author. But this mode which is ſubſtituted in lieu of the other was ſtill required for the purpoſe of notifying to the public the name of the author aſſerting his excluſive right, and as a warning to others not to offend againſt it. In *Donaldſon* v. *Becket* in the Houſe of Lords the majority of the judges who delivered their opinions thought that ſince the ſtatute of *Anne* the author had no other legal remedy than that given to him by the ſtatute upon the terms and conditions therein preſcribed, one of which is that the work ſhall be entered. 3dly, The work being originally publiſhed without the author's name, and not being entered at that time, muſt be conſidered as evidence of his intention to abandon it to the public; and upon a ſpecial caſe the Court are ſubſtituted for the jury as to the concluſions to be drawn from the facts ſtated. And though it is ſaid that the defendant knew the author by publiſhing his name to the pirated work, yet he could not know whether he were living or where he was to be found.

Reader, in reply, obſerved that the opinion of the majority of the judges in *Donaldſon* v. *Becket* did not proceed upon the ſpecific remedy which the party had under the ſtatute, but merely as to his right of property being confined to that given to him by the ſtatute as contradiſtinguiſhed from the common law.

Lord KENYON Ch. J. All arguments in ſupport of the rights of learned men in their works muſt ever be heard with great favour by men of liberal minds to whom they are addreſſed. It was probably on that account that when the great queſtion of literary property was diſcuſſed ſome judges of enlightened underſtanding went the length of maintaining that the right of publication reſted excluſively in the authors and thoſe who claimed under them for all time: but the other opinion finally prevailed, which eſtabliſhed that the right was confined to the times limited by the act of parliament. And that I have no doubt was the right deciſion. Then the queſtion is whether, the right of property being veſted in authors for certain periods, the common law remedy for a violation of it does not attach within the times limited by the act of parliament. Within thoſe periods the act ſays that the author *ſhall have the ſole right and liberty* of printing &c. Then, the ſtatute having veſted that right in the author, the common law gives the remedy by action on the caſe for the violation of it. Of this there could have been no doubt made, if the ſtatute had ſtopped there. But it has been argued that, as the ſtatute in the ſame clauſe that creates the right has preſcribed a particular remedy, that and no other can be reſorted to. And if ſuch appeared to have been the intention of the Legiſlature, I ſhould have ſubſcribed to it however inadequate it might be thought. But their meaning in creating the penalties in the latter part of the clauſe in queſtion certainly was to give an accumulative remedy: nothing could be more incomplete as a remedy than thoſe penalties alone; for without dwelling upon the incompetency of the ſum, the right of action is not given to the party grieved, but to any common informer. I cannot think that the Legiſlature would act ſo inconſiſtently as to confer a right, and leave the party whoſe property was invaded without redreſs. But there was good reaſon for requiring an entry to be made at *Stationers' Hall*, which was to ſerve as a notice and warning to the public, that they might not ignorantly incur the *forfeitures or penalties* before enacted againſt ſuch as pirated the works of others: but calling on a party who has injured the civil property of another for a remedy in damages cannot properly fall under the deſcription of *a forfeiture or penalty*. Some ſtreſs was attempted to be laid on the acts paſſed for preſerving the property of engravers in their works, in which a ſpecial proviſion is made to meet ſuch

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a caſe as the preſent, and to give the ſame right of action as is here contended for. But it is well known that proviſions of that kind are frequently inſerted in acts of parliament pro majori cautelâ; and no argument can be drawn from them to affect the conſtruction of other acts of parliament. On the fair conſtruction of this act therefore I think it veſts the right of property in the authors of literary works for the times therein limited, and that conſequently the common law remedy attaches if no other be ſpecifically given by the act; and I cannot conſider the action given to a common informer for the penalties, which might be pre-occupied by another, as a remedy to the party grieved within the meaning of the act.

Ashhurst J. In the caſe alluded to of *Donaldſon* v. *Becket* in the Houſe of Lords, I was one of thoſe who thought that the invention of literary works was a foundation for a right of property independently of the act of Queen *Anne*. But I ſhall not enter into the diſcuſſion of that point now, as the queſtion in the preſent caſe is much narrowed. And upon the conſtruction of that act I entirely concur with my Lord that, the act having veſted the right of property in the author, there muſt be a remedy in order to preſerve it. Now I can only conſider the action for the penalties given to a common informer as an additional protection, but not intended by the legiſlature to ouſt the common law right to proſecute by action any perſon who infringes this ſpecies of property, which would otherwiſe neceſſarily attach upon the right of property ſo conferred. Where an act of parliament veſts property in a party, the other conſequence follows of courſe, unleſs the Legiſlature make a ſpecial proviſion for the purpoſe; and that does not appear to me to have been intended in this caſe. I am the more inclined to adopt this conſtruction, becauſe the ſuppoſed remedy is wholly inadequate to the purpoſe. The penalties to be recovered may indeed operate as a puniſhment upon the offender, but they afford no redreſs to the injured party; the action is not given to him, but to any perſon who may get the ſtart of him and ſue firſt. It is no redreſs for the civil injury ſuſtained by the author in the loſs of his juſt profits.

Grose J. The principal queſtion is whether within the periods during which the excluſive right of property is ſecured by the ſtatute to the author he may not ſue the party who has invaded his right for damages up to the extent of the injury ſuſtained;

tained; and of this I conceive there can be no doubt. In the great caſe of *Millar* v. *Taylor* Mr. Juſtice *Yates* gave his opinion againſt the common law right contended for in authors; but he was deciſively of opinion that an excluſive right of property was veſted in them by the ſtatute for the time limited therein. No words can be more expreſſive to that effect than thoſe uſed by him. But it is to be obſerved that the penalties given by the act attach only during the firſt fourteen years of the copyright; and during that time only is the offender liable for ſuch penalties if he invade the author's right: but he is liable during the whole period preſcribed by the act to make good in an action for damages any civil injury to the author. If this conſtruction were not to prevail, during the laſt fourteen years of the term the author would be wholly without remedy for any invaſion of his property. But there muſt be a remedy, otherwiſe it would be in vain to confer a right. I was at firſt ſtruck with the conſideration that ſix to five of the judges, who delivered their opinions in the Houſe of Lords in the caſe of *Donaldſon* v. *Becket*, were of opinion that the common law right of action was taken away by the ſtatute of *Anne*: but upon further view it appears that the amount of their opinions went only to eſtabliſh that the common law right of action could not be exerciſed beyond the time limited by that ſtatute.

LAWRENCE J. I entirely concur with the opinions delivered by my Brethren upon the principal point, and the caſe of *Tonſon* v. *Collins*, 1 *Blac. Rep.* 330. is an additional authority in ſupport of it; for there Lord *Mansfield* ſaid that it had been always holden that the entry in *Stationers' Hall* was only neceſſary to enable the party to bring his action for the penalty, but that the property was given abſolutely to the author, at leaſt during the term.

Poſtea to the plaintiff.

1798.

Saturday, May 5th.

Brown *againſt* Turner.

If a broker draw on his employer for differences paid for him in ſtock-jobbing tranſactions, and the employer accept the bill, and then the broker indorſe it to a third perſon after it is due, the latter cannot recover on the bill. Jobbing in *Omnium* is within the ſtat. 7 *G.* 2. *c.* 8.

This action, which was brought by the indorſee of a bill of exchange againſt the acceptor, was tried before Lord *Kenyon* at the ſittings in this term, when the facts appeared to be theſe. The defendant employed one *Pritchard* a broker to tranſact ſome buſineſs for him in ſtock-jobbing in the ſtock called the Omnium, who paid the differences for him, and then drew the bill in queſtion on the defendant for the amount of thoſe differences, which the defendant accepted; afterwards and after the bill became due *Pritchard* indorſed the bill to the plaintiff for a prior debt. Two queſtions were made, 1ſt, Whether Omnium was one of the "public ſtocks or ſecurities" within the ſtat. 7 *Geo.* 2. *c.* 8. (*a*), the ſcrip receipts not being then in the market, though the loan had been voted in the Houſe of Commons? 2dly, Whether the illegality of the original tranſaction vitiated this bill, the plaintiff having taken it after it became due, and conſequently not being entitled to recover on it if *Pritchard* could not? Lord *Kenyon* being of opinion againſt the plaintiff on both the points, a verdict was taken for the defendant; to ſet aſide which

Garrow moved on a former day in this term on the authority of *Faikney* v. *Reynous*, 4 *Burr.* 2069, and *Petrie* v. *Hannay*, *ante*, 3 vol. 418., when the Court reluctantly granted a rule to ſhew cauſe: but on this day

The Court ſaid they were clearly of opinion on the conſtruction of the act of parliament and on the authority of *Steers* v. *Laſhley* (*b*) that the plaintiff was not entitled to recover; and they deſired that the rule might not be drawn up.

Rule refuſed.

(*a*) Which (after reciting the inconveniences ariſing from the pernicious and deſtructive practice of *ſtock-jobbing*) enacts that all contracts, upon which any premium ſhall have been given or paid for liberty to put upon or to deliver receive accept or refuſe *any public or joint ſtock or other public ſecurities whatever*, and alſo all wagers and contracts in the nature of wagers relating to the price or value of ſtocks or ſecurities, ſhall be null and void &c.

(*b*) *Ante*, 6 vol. 61.

LOVELACE *againſt* CURRY.

Monday, May 14th.

No action can be brought againſt a juſtice of the peace for an act done by him in that character without giving him a month's *notice of the writ or proceſs* intended to be ſued out as well as of the *cauſe of action.*

THIS was an action of treſpaſs and falſe impriſonment againſt the defendant for an act done by him as a juſtice of the peace in the county of *Southampton*. At the trial at the laſt *Wincheſter* aſſizes before *Perryn* B. it was objected on behalf of the defendant that the notice (*a*) was not conformable to the ſtat. 24 *Geo.* 2. *c.* 44 (*b*) in not ſtating what particular writ or proceſs the plaintiff intended to ſue out and what form of action he intended to commence; and the caſe of *Strickland* v. *Ward* (*c*) was relied on in ſupport of the objection: but the objection was

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(*a*) The notice was thus "You having on &c. as one of His Majeſty's juſtices of the peace &c. unlawfully impriſoned and cauſed to be impriſoned *J. Lovelace* of &c. in priſon without any reaſonable or probable cauſe, for a long ſpace of time, to wit, for the ſpace of 24 hours, contrary to the laws and cuſtoms of this realm, and againſt the will of the ſaid *J. Lovelace*, I do as the attorney of and for the ſaid *J. Lovelace* according to the form of the ſtatute in ſuch caſe made and provided hereby give you notice that I ſhall at or ſoon after the expiration of one calendar month cauſe an action to be commenced and proſecuted againſt you in his Majeſty's court of King's Bench for your ſaid miſconduct. Dated &c.;" and ſigned by *D. Howard*, the plaintiff's attorney.

(*b*) Which is entitled "An act for rendering juſtices of the peace more ſafe in the execution of their office &c.;" and which enacts "that no writ ſhall be ſued out againſt, nor any copy of any proceſs at the ſuit of a ſubject ſhall be ſerved on, any juſtice of the peace for any thing by him done in the execution of his office, *until notice in writing of ſuch intended writ or proceſs* ſhall have been delivered to him &c. at leaſt one calendar month before the ſuing out or ſerving of the ſame; *in which notice ſhall be clearly and explicitly contained the cauſe of action* which ſuch party hath or claimeth to have againſt ſuch juſtice &c."

(*c*) The note of that caſe, as cited at the trial, was as follows; "*Strickland* v. *Ward*, ſummer aſſizes at *Wincheſter* 1767, cor. *Yates* J.

Action of treſpaſs and falſe impriſonment againſt the defendant, who was a juſtice of the peace, and had committed the plaintiff for returning to the pariſh whence he had been removed. The notice given to the defendant purſuant to ſtat. 24 *Geo.* 2. was that an *action on the caſe for falſe impriſonment and aſſault* would be brought againſt him. The counſel for defendant objected to the notice as inſufficient, becauſe not conformable to the words of the ſtatute, and tending to miſlead the juſtice who might know that an action on the caſe was improper, and ſuch whereon the plaintiff might be nonſuited, and therefore neglect to tender amends.

To this it was anſwered that the words "aſſault and falſe impriſonment" in the notice ſufficiently ſpecified the cauſe of complaint; and that a juſtice who would lie by and omit to tender amends, relying on ſo trivial a miſtake, was not entitled to any favour from the Court.

YATES J. held the notice inſufficient as not being conformable to the words of the ſtatute; and ſaid that he could not blame any juſtice, who being troubled with an unjuſt action ſhould lay hold of this or any other trifling objection to nonſuit a plaintiff.

Serjeant BURLAND deſired the point might be reſerved; but the plaintiff was afterwards nonſuited upon the merits."

overruled. The cauſe then proceeded, and the defendant obtained a verdict on the merits.

Scott, *W.*, on a former day in this term moved to ſet aſide the verdict as being contrary to the weight of evidence; on which

Bond, for the plaintiff, ſuggeſted that he thought the preliminary objection which he had taken at the trial reſpecting the notice was deciſive in his favour, in which caſe it would be immaterial to conſider whether or not the jury had given a proper verdict on the merits.

The Court then deſired that the formal objection might be firſt diſpoſed of; accordingly on this day

Erſkine and *Scott*, on behalf of the plaintiff, contended that the plaintiff had complied with the ſpirit and meaning of the act of parliament by giving the notice he had given. That the object of the Legiſlature in requiring notice to be given to the magiſtrate of the action intended to be brought againſt him was to enable him, in caſe he had by any accident exceeded his juriſdiction, to tender amends to the party grieved; for which purpoſe the act requires that the plaintiff ſhall give notice of his intention of commencing the action, ſpecifying in that notice the act of which he complains: but whether he ſues out one writ or another is perfectly immaterial for this purpoſe, and giving notice of the particular writ intended to be ſued out conveys no information whatever; for every perſon may know the proceſs by which he may be ſued in any particular court. That the words in the ſtatute "Notice of ſuch intended writ or proceſs" only meant notice of the action intended to be commenced. That this notice was drawn according to many precedents; and that a determination that this notice was inſufficient would be the means of entangling innocent and injured perſons in the forms of juſtice. That the caſe relied upon at Niſi Prius was perfectly diſtinguiſhable from this, becauſe there the plaintiff had miſled the juſtice by giving notice of his intention to bring an *action on the caſe* and had afterwards commenced an *action of treſpaſs and falſe impriſonment:* whereas here the notice was conſiſtent with the action which was afterwards brought.

Bond, *Gibbs*, and *Lens*, contrà, were ſtopped by the Court.

Lord Kenyon Ch. J. We are bound to decide according to the law as we find it, without conſidering whether or not the Legiſlature did right in requiring the notice to be given that is required by the

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the act of parliament alluded to. I confeſs I was a little ſurpriſed to hear it ſaid that this notice was drawn according to precedent, becauſe ever ſince the caſe of *Strickland* v. *Ward* I believe it has been taken for granted that ſuch a notice as the preſent is not a good one. My manuſcript note of that caſe, which was given to me by the late Lord *Aſhburton* one of the counſel in the cauſe, agrees with that which was referred to on the trial of this caſe. And if it is ſuppoſed that the learned judge who held the objection to be fatal in that caſe decided in favour of great men againſt perſons in inferior ſtations of life, his character is but little known to thoſe who make the ſuppoſition; for if ever there exiſted a man who was a firm guardian of the liberties of his country and a liberal ſupporter of thoſe who ſued for juſtice, it was the late Mr. Juſtice *Yates*. That learned judge ruled (*a*) that a notice under this act

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(*a*) We have ſince been favoured with the original note book of Mr. J. *Yates*, containing the trial and every thing that paſſed in the caſe of *Strickland* v. *Ward*, from which the following account of the objections made by the defendant's counſel is taken.

"OBJECTIONS.—No notice given of the writ or proceſs, yet expreſsly required by the 24 *Geo.* 2. that no writ or proceſs ſhall be ſued out *till notice* is given to the defendant *of ſuch writ or proceſs*. The notice given is of an action upon the caſe; ſuch an action would not lie in this caſe. Defendant might therefore rely on nonſuiting the plaintiff in ſuch an action, and with that view make no tender of amends. A miſleading notice. So far from appriſing the defendant of the writ or proceſs intended to be ſued out, that the proceſs in ſuch an action muſt neceſſarily be of a different nature from the preſent. The writ in this action was ſued out without any previous notice of it. No notice was given of this writ; none that would agree with this writ. The words in the act of parliament are poſitive and peremptory that notice ſhall be given of the very writ or proceſs intended to be ſued out. Where a plaintiff files common bail for a defendant under the ſtatute, and leaves a declaration in the office, he muſt give notice of it to defendant. If the notice vary from the nature of the declaration filed, *e. g.* if notice be given of a declaration upon the caſe when in truth the declaration is in treſpaſs, the proceedings are void; yet defendant muſt know the nature of the true cauſe of action which the plaintiff means to complain of. The ſtat. of 24 *Geo.* 2. was expreſsly to render juſtices of the peace more ſafe in the execution of their offices; requires preliminary formalities, notice, copy of the warrant &c.

ANSWER.—The notice very fully diſcloſes the nature of the plaintiff's complaint and the whole cauſe of action at length. The words "action upon the caſe" ſuperfluous, and repugnant to the ſubſequent deſcription of the injury; may therefore be rejected. The end of the ſtatute was merely to give the juſtice ſufficient notice of the intended ſuit and the nature of the complaint that he may tender amends &c.

REPLY.—The ſtatute requires notice of the writ or proceſs, and further requires a ſpecification of the cauſe.

I gave my opinion deciſively in favour of the objections: but my brother *Burland* deſired that the point might be ſaved for the opinion of the court of Common Pleas, and I conſented that it ſhould.—Point reſerved."

By the ſame note it alſo appears that the cauſe proceeded, and that the defendant produced in evidence a warrant ſigned by him on the 16th of *January* 1766, reciting a con-

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act of parliament ought to be preciſe, and ſaid that the magiſtrate did right in not tendering amends becauſe the notice was not conformable to the ſtatute. And if it were right then, à fortiori it is right now, that deciſion having been acted upon for 30 years and followed by ſeveral determinations at Niſi Prius. Therefore on the words of the act of parliament requiring notice of the writ or proceſs intended to be ſued out, and on the authority of that caſe, followed up as it has been by other deciſions at Niſi Prius, I am of opinion that the notice given in this caſe was inſufficient; and that therefore the rule for a new trial muſt be diſcharged.

Ashhurst J. The Legiſlature having preſcribed a certain form of notice to be given to the magiſtrate, it is beſt to adhere to it.

Grose J. The words of the act of parliament are clear and poſitive. It is impoſſible to read them without obſerving that two things are required before an action can be brought againſt a magiſtrate, one that the plaintiff ſhall give notice in writing of the writ or proceſs that he intends to ſue out, the other that ſuch notice ſhall alſo contain the cauſe of action. The former words are not immaterial; it is well known that there are ſome writs that the party may and ſome that he may not ſue out in ſuch a caſe; and if the plaintiff were to give notice that he intended to ſue out one of the latter kind, *e. g.* a quo minus in the court of King's Bench, the magiſtrate knowing that to be a deciſive objection need not tender amends, but may take advantage of the objection at the trial. Now in this caſe there was no notice of any writ or proceſs that the plaintiff intended to ſue out. I accede to the doctrine laid down by Mr. J. *Yates* in the caſe cited, and I have ſeveral times acted upon it at Niſi Prius. The precedents of notices are alſo different from the notice given in this caſe.

Lawrence J. The only queſtion before the Court is whether or not the terms of the act of parliament have been complied with; for if not, the action cannot be maintained. Now the

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a conviction of the defendant for unlawfully returning to *Alverſtoke* after being legally removed from thence to *Ringwood* without bringing a certificate &c., and requiring the keeper of the houſe of correction at *Goſport* to keep the plaintiff to hard labour for 26 days; and he alſo produced the conviction, referred to in the warrant, regularly drawn up; on which Mr. J. *Yates* adds "I gave my opinion that this conviction could not be controverted in evidence; that the juſtice having a competent juriſdiction of the matter his judgment was concluſive till reverſed or quaſhed; and that it could not be ſet aſide at Niſi Prius." And accordingly the plaintiff was nonſuited.

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act requires notice of the writ or proceſs intended to be ſued out as well as of the cauſe of action: but no writ or proceſs whatever is mentioned in this notice, and therefore the plaintiff has not complied with the ſtatute. In addition to the caſe already cited, there was another caſe in this court ſome years ago which ſhews that the terms of the act of parliament muſt be purſued in the notice; *Taylor* v. *Fenwick*, *M.* 23 *Geo.* 3. *B. R.* The notice was written by the attorney, and ſigned by him thus "given under my hand at *Durham*." The attorney in fact lived at *Durham*, but it was not expreſsly ſtated that *Durham* was the place of his reſidence. On a motion in this court to enter a nonſuit, *Wallace* and *Lee* contended that what appeared on the notice was equivalent to a poſitive allegation that the attorney lived at *Durham*. *Sed per Curiam*, The ſtatute has preſcribed a form which muſt be implicitly followed; and it admits of no equivalent. The ſtatute was made to introduce a ſtrictneſs of form in favor of juſtices, and it muſt be obſerved literally. And a nonſuit was entered. So here as the terms of the act of parliament have not been attended to, this rule muſt be diſcharged.

Rule diſcharged.

Goodtitle on the Demiſe of Richardson *againſt* Anthony Edmonds.

Tueſday, May 15th.

A. deviſed two houſes to his wife for life, and willed that on payment of a ſum of money to the wife by *B.* (one of his ſons) *B.* ſhould ſhare equally alike with the reſt of his brothers and ſiſters, *C. D.* and *E.*; and if any of his children ſhould die, then the ſhare of him or her ſhould go among the ſurvivors: held that the children *B. C. D.* and *E.* took only eſtates for life under the will.

On the trial of this ejectment a ſpecial caſe was reſerved for the opinion of this Court.

A. Edmonds being ſeiſed in fee of two houſes with the garden yard and appurtenances in *Finkle-Street* in *Selby* by will duly executed dated 25th *December* 1759 deviſed the ſame to his wife *M. Edmonds*, together with all the barns, ſtables, &c, and other appurtenances, all which premiſes he willed ſhould be enjoyed by his ſaid wife ſo long as ſhe remained a widow, or during her natural life. He likewiſe gave to his wife another houſe then in the occupation of *T. Archer* ſituate &c. to be by her diſpoſed of as ſhe ſhould ſee meet or convenient to do with the ſame. He then willed that his ſon *J. Edmonds* ſhould pay to his (the deviſor's) ſaid wife a certain ſum due to him and after that money was paid to his ſaid wife he willed that his ſaid ſon ſhould ſhare equally alike with the reſt of his brothers and ſiſter namely *Ann Richardſon* the wife of *William Richardſon*, *Anthony Edmonds* and *Thomas Edmonds*, his (the deviſor's) children; and if any of his ſaid children ſhould happen to die, then the ſhare of him or her ſhould go among the ſurvivors. Then after diſpoſing of ſome of his perſonalty "his will was that his ſaid wife ſhould not diſpoſe of any of the houſehold goods, but after her deceaſe or marriage which ſhould firſt happen his mind was that they with the houſes aforeſaid ſhould be equally ſhared among his ſaid children as aforeſaid, or as ſhe ſhould think proper to diſpoſe of amongſt them; and his mind was that his ſaid wife ſhould not ſell or mortgage either of the aforeſaid houſes." The deviſor died in 1760, leaving *M. Edmonds* his widow, and *J. Edmonds*, *Ann Richardſon*, *Anthony Edmonds*, and *Thomas Edmonds*, his four children. On the death of the deviſor *Mary* his widow entered upon and held the premiſes till her death, which happened in 1794. Three of the teſtator's children died after the teſtator and in the lifetime of their mother, viz. *John* the eldeſt ſon died in 1767 without iſſue; *Anthony* the ſecond ſon died in 1774, leaving *Anthony* the defendant his eldeſt ſon and heir at law; *Ann* the daughter died in 1778, leaving *Thomas Richardſon* the leſſor of the plaintiff her eldeſt ſon and heir at law. After the deaths of the ſaid deviſor's children *John Anthony* and *Ann*, but in the lifetime of their brother *Thomas*, the ſaid *Mary Edmonds* the widow in her lifetime made her will, duly executed and atteſted dated 13th *April* 1790, wherein ſhe deviſed to her ſon the ſaid *Thomas Edmonds* and to his heirs and aſſigns for ever all her real and perſonal eſtates whatſoever in *Selby* aforeſaid and elſewhere. And ſhe appointed him ſole executor. *Thomas* the younger ſon of the teſtator ſurvived his mother, and on her death entered upon and held the premiſes during his life. The ſaid *Thomas* died unmarried in 1797, having firſt made and duly executed his will in the preſence of three witneſſes dated 27th *December* 1796, wherein (after directing his debts to be paid and giving certain pecuniary and ſpecific perſonal legacies) he gave to his nephew *Thomas Richardſon* (the leſſor of the plaintiff) 20*l.*: but in caſe his ſaid nephew refuſed to ſign and execute to his executor when required a releaſe of all his right, eſtate, and intereſt in and to his (the teſtator's) meſſuages lands tenements and hereditaments ſituate at *Selby* aforeſaid and all other his eſtate whatſoever and whereſoever, then the legacy or bequeſt of 20*l.* ſo given to him as aforeſaid ſhould be null and void. And he he thereby charged his ſaid real eſtate to and with the payment of his debts and the ſaid legacy; and as to all and every his meſſuages lands tenements &c. at *Selby*, and all and every other his real and perſonal eſtate and effects &c. he deviſed to his nephew *Anthony Edmonds* (the defendant) his heirs executors adminiſtrators and aſſigns for ever: and he thereby appointed his nephew *A. Edmonds* his ſole executor. *Anthony* the defendant and deviſee in the will of the ſaid *Thomas Edmonds* is now the heir at law of the ſaid *John Edmonds* and *Thomas Edmonds* his uncles, and alſo of his grandfather the ſaid deviſor *Anthony Edmonds*. The two houſes were after the death of *Mary Edmonds* the widow conſiderably improved by the ſaid *Thomas Edmonds* and divided into eight ſeparate tenements, which are now of the value of 700*l*. The queſtion reſerved for the opinion of the Court is whether the plaintiff is entitled to recover.

Chambre, for the leſſor of the plaintiff, contended that he was entitled to recover one third or at leaſt one fourth of the freehold. The difference conſiſts in this that the deviſe to the eldeſt ſon of his ſhare was on condition that he ſhould pay a certain debt to the teſtator's widow, which it does not appear that he ever paid, and if not his ſhare would be apportioned amongſt the other children of the teſtator. But if that be doubtful, at any rate the leſſor is entitled to recover a fourth; and this will depend on two queſtions: 1ſt, Whether the children of the deviſor took eſtates in fee or for life only? 2dly, Whether, ſuppoſing them to take in fee, they took as tenants in common or as joint tenants? Firſt, The children took a fee. It is true there are no words of limitation after the deviſe to them; the deviſor appears to have been ignorant of the uſe of any ſuch words; he had before deviſed certain of the premiſes to his wife, "*to be by her diſpoſed of as ſhe ſhould* "*ſee meet or convenient to do with the ſame*," which is a very inartificial manner of giving her the abſolute diſpoſition of the property. But it alſo appears from the whole of the will that where he meant to confine the intereſt deviſed to the life of the deviſee he ſo expreſſed it in terms, as in the firſt deviſe to the wife; or elſe by negative words, as in the ſubſequent part of the will where he prohibited her from ſelling or mortgaging either of the houſes. It is evident that he meant to give a fee to his children; for eſtates for life would not anſwer his intent, which was to make a family proviſion; and there are no reſtrictive words annexed to the eſtate deviſed to them. Beſides the

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the deviſe of the freehold to them is coupled with the perſonal property which was before given to the wife for life. It is alſo to be obſerved that the heir at law is joined in the deviſe to the children on certain terms, and the other children are to ſhare together with him; and therefore they muſt take eſtates of equal duration as he would have taken ſuppoſing there had been no deviſe at all; for it is clear that if the terms were not complied with he meant to diſinherit the heir at law altogether. The caſe of *Oates* v. *Brydon* (*a*) was not ſo ſtrong for a fee as the preſent, though ſimilar in many reſpects. It was a family proviſion; and the ſubject-matter of the deviſe was a houſe and ſtable, which, as Lord *Mansfield* ſaid, was a waſting property; and it was firſt expreſsly deviſed for the lives of two perſons in ſucceſſion, and afterwards to the children of *F. B.* and *S. W.* ſhare and ſhare alike to be divided amongſt them. In that caſe there were no words of limitation; and yet it was holden that the children took a fee, though there was a reſiduary deviſee, which there is not in this caſe as to the real eſtate. So in *Roſe* d. *Vere* v. *Hill* (*b*), a deviſe by a teſtator to his five children and the ſurvivors and ſurvivor of them, and the executors &c. of ſuch ſurvivor ſhare and ſhare alike as tenants in common and not as joint tenants, was holden to give a tenancy in common in fee to the children. 2dly, The children took as tenants in common and not as joint tenants. And when the deviſor ſpeaks of ſurvivorſhip, he merely meant to provide againſt a lapſe in caſe any of his children ſhould die in his own lifetime; for he made that proviſion before any deviſe to the children. *Stringer* v. *Phillips* (*c*), *Stones* v. *Heartly* (*d*), and *Roſe* d. *Vere* v. *Hill* (*e*). A power is given to the wife to diſpoſe of the property amongſt the children, which muſt be underſtood in ſeveralty; and it is in default of her appointment that the children are to ſhare equally. That power muſt have been executed, if at all, in her lifetime; and therefore the ſurvivorſhip which is before ſpoken of muſt relate to the time of the deviſor's death, and not of the wife's. The effect of the deviſe therefore is that the children living at the time of the deviſor's death ſhould take equally, ſubject to any alteration by the ſubſequent appointment of the wife. And as the power of appointment given to her was not confined to eſtates for life to the

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(*a*) 3 *Burr.* 1895.

(*b*) *Ib.* 1881.

(*c*) 1 *Eq. Caſ. Abr.* 292. pl. 11.

(*d*) 1 *Vez.* 165.

(*e*) 3 *Burr.* 1881.

the children, ſo neither could the deviſor have intended ſo to confine the eſtates given to them in the event of her not appointing. Now the appointment by the wife was not made until all the children but one were dead, in which caſe her power of appointment was gone, and therefore the eſtate would veſt in that one under the will and not under the appointment. *Madoc* v. *Jackſon* (*a*).

Wood contrà. In whatever point of view this caſe is conſidered, the defendant is entitled to the judgment of the Court. The power of appointment remained notwithſtanding all the children but *Thomas* were dead: it was limited to take place "after her "deceaſe or marriage, which ſhould firſt happen," and conſequently muſt be confined to the objects then in being. But ſuppoſing the appointment to be bad, yet under the will alone of *Anthony Edmonds* the eſtate would go over to *Thomas* the ſurviving ſon. The eſtate was firſt given to the widow for life or durante viduitate; then after her deceaſe or marriage which ſhould firſt happen "to be equally ſhared by his children *as aforeſaid*;" that refers to the former part of the will, whereby it appears that the ſhare of any dying was to go to the ſurvivor, which muſt neceſſarily mean the ſurvivor at the time of the wife's death. For ſhe had the ſole diſpoſing power over the eſtate during her life, and it was only in caſe of her not exerciſing that power that it was to be equally ſhared amongſt the ſurvivors: but who they would be could not be aſcertained until her death. And the defendant is equally entitled whether the children took eſtates for life or in fee. If in fee, then the defendant is entitled as deviſee under *Thomas*, the ſurvivor at the time of the widow's death: if only for life, then the defendant claims as heir at law to the deviſor of the reſidue undiſpoſed of.

Lord KENYON Ch. J. Although this is a perplexed will, we muſt endeavour to extract the deviſor's meaning from it as well as we can. The defendant is the heir at law of the deviſor, he is the deviſee of the ſurviving child of the deviſor, and the deviſee and appointee of the widow of the deviſor *Anthony Edmonds*; and therefore if the will of the deviſor, *A. Edmonds*, is ſo unintelligible that we cannot ſay with certainty that any eſtate paſſed by it, or if only eſtates for life to his children paſſed by it, or if an eſtate in fee paſſed to the ſurvivor of thoſe children under the will,

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(*a*) 2 *Bro. Ch. Caſ.* 588.

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will, or if the appointment of the widow were good, in either of theſe caſes the defendant is entitled to our judgment. And the ſecond of thoſe points is (I think) with him; there being no words of limitation to give an eſtate in fee to the deviſor's children. To prove that a fee paſſed to them the plaintiff's counſel cited the caſe of *Oates* d. *Wigfall* v. *Brydon*: but after the argument and before the deciſion of that caſe Lord *Manſfield* (certainly from the moſt earneſt wiſh to do juſtice between the parties) directed certain inquires to be made reſpecting the value of the eſtate deviſed, which at the time gave diſſatisfaction to the profeſſion, who thought that the rules of law ought to prevail in the conſtruction of the will whether the eſtate deviſed by it were of the value of 20 *l.* or 2000 *l.* per annum. But I believe that in ſubſequent caſes Lord *Manſfield* doubted whether in the deciſion of that caſe he had proceeded on ſubſtantial grounds; for in ſome of thoſe caſes where he had no doubt but that the deviſor meant to give a fee he lamented that there were not words in the will ſufficient for that purpoſe. Now I find no words in this will ſufficient to carry a fee. We are left to conjecture on the ſeveral arguments uſed by the plaintiff's counſel: but no conjecture of ours is ſufficient to diſinherit the heir at law. I admit that if the purpoſes of the will cannot be anſwered but by the deviſee's taking a fee, a fee will paſs, as in *Shaw* v. *Weigh* (*a*), or where an eſtate is given to the deviſee he paying a ſum of money: but I know of no other caſe where a deviſee takes a fee unleſs there be words in the will (though no technical words are neceſſary for that purpoſe) ſufficient to paſs a fee. This is a ſacred rule of property not to be broken in upon; if we were now to depart from it, it would be removing one of the great land-marks of real property. On that ground alone therefore I am of opinion that the defendant is entitled; and I rather think, though in this I merely hazard a conjecture, that the teſtator meant to give the eſtate to the children who ſhould be living at the death of his widow; and in that caſe if the child, who ſurvived the widow, took a fee, the defendant is the deviſee of that child; if that child only took an eſtate for life, then the defendant claims as heir at law of the deviſor *A. Edmonds*.

The other Judges were of the ſame opinion.

Poſtea to the defendant.

(*a*) *Fitzg.* 18. 2 *Str.* 803. *Fort.* 71.

Tueſday, May 15th.

Lord GWYDIR and Others *againſt* FOAKES.

By a grant of all tithes ariſing out of or in reſpect of *farms lands* &c. the tithes ariſing out of and in reſpect of rights of common appurtenant to ſuch farms or lands will paſs.

THIS was a feigned action brought againſt the defendant as one of the commiſſioners named in an incloſure act paſſed in the 37 *Geo.* 3. *c.* 144. entitled "An Act for dividing allotting and incloſing the open and common fields &c. heaths waſtes and commonable woods lands and grounds within the pariſh of *Croydon* in the county of *Surry*," to try the following queſtions; 1ſt, Whether one *Robert Boxall* was or was not entitled to the rectorial tithes of the ſaid commons &c.? 2dly, Whether the ſaid *Boxall* was or was not entitled to a portion of the ſame? 3dly, Whether the plaintiffs or any or either of them were ſo entitled? The defendant aſſerting the affirmative upon the two firſt iſſues, and the plaintiffs upon the laſt. There were diſtinct iſſues upon each of the claims. At the trial of the cauſe before *Hotham* B. at the laſt *Kingſton* aſſizes a caſe was reſerved for the opinion of this Court ſtating the following facts.

The rectory of *Croydon* otherwiſe *Bermondſey* is an impropriate rectory, and together with the rectorial tithes ariſing within the pariſh of *Croydon* before and at the dates of the reſpective conveyances to the plaintiffs and Mr. *Boxall* hereinafter ſet forth was legally veſted in *George Samuel* late Lord Viſcount *Montague*, and after his deceaſe in his ſiſter the Honourable *Elizabeth Mary Brown* (now the wife of *William Stephen Poyntz* Eſq.) or in truſtees for them, and ſuch conveyances were ſeverally executed by all neceſſary parties. By indenture of bargain and ſale of the 17th of *December* 1788, Lord *Montague* conveyed to the plaintiff Lord *Gwydir* in fee all the tithes and tenths of corn, grain, hay and wood, and all and all manner of other tithes, tenths, portions of tithes, penſions, oblations, obventions, and fruits whatſoever belonging to or parcel of the rectory impropriate of *Croydon* otherwiſe *Bermondſey* in the county of *Surry* yearly *coming ariſing accruing growing increaſing renewing and happening or to come ariſe accrue grow increaſe renew and happen out of and upon for or in reſpect of the ſeveral meſſuages or tenements farms lands and hereditaments ſituate lying and being in the pariſh of* Croydon *in the ſaid county of* Surry, thereinafter particularly mentioned and deſcribed, or any of them, or any part thereof, viz. all that meſſuage or tenement and farm and the lands and grounds and hereditaments

hereditaments thereunto belonging or appertaining, commonly called *Ham Farm*, the property of the ſaid Lord *Gwydir*, containing 248 A. 1 R. 17 P. in the occupation of *J. Turner*; and all that and thoſe the tenement and farm and the lands grounds and hereditaments thereunto belonging or appertaining called *Woodſide Farm*, belonging to *Croydon Hoſpital*, containing 99 A. 2 R. 15 P. in the occupation of *John Peacock*. This deed then goes on to particularize a variety of other lands, deſcribing ſome of them in words exactly correſponding with thoſe above ſet out, deſcribing others as *lands and grounds* called Addiſcombe Farm, others as *lands grounds and hereditaments thereto belonging* called Stroud Green Farm, and others as *lands grounds and hereditaments* lying in certain ſituations, naming the ſuppoſed proprietors and actual occupiers of each ſeparate farm and parcel of land; the whole of which ſaid meſſuages or tenements farms lands grounds and premiſes in reſpect whereof or out of which the ſaid tithes mentioned to be thereby releaſed come ariſe accrue grow increaſe renew and happen contain in the whole by an admeaſurement lately made 588 A. 2 R. 6 P. more or leſs, and are delineated and deſcribed in a plan annexed. In another conveyance to *R.* and *F. Meager*, others of the plaintiffs, the words of conveyance were the ſame in ſubſtance as in the former with a correſponding deſcription of the cloſes and the names of the ſeveral proprietors and occupiers, with like reference as to the boundaries to a plan annexed. In another conveyance to *T. Meager*, another of the plaintiffs, the ſame terms are uſed, deſcribing ſome of the meſſuages or tenements and farms "with the hereditaments thereunto belonging or "appertaining;" and ſome parcels of lands without thoſe additional words, and expreſſed to be principally though not entirely in the grantees' own poſſeſſion, with a ſtatement of the whole contents of the lands and a ſimilar reference to a plan annexed. Other conveyances to *G. Mathew* and *J. Farley*, others of the plaintiffs, were in the ſame manner as the laſt. In another conveyance to *R. Chatſield* the grant of the tithes is ſtated to be "out "of upon for or in reſpect of the ſeveral *lands tenements and here-* "*ditaments*," deſcribing them as before, to hold the ſaid tithes hereditaments and premiſes with the appurtenances to the ſaid *R. C.* &c. In another conveyance to *G. Lane*, another of the plaintiffs, the words are the ſame excepting that the tithes are ſtated to ariſe *out of*, *for*, *or in reſpect of*, the ſeveral lands tenements and hereditaments after deſcribed, viz. (ſetting out the contents of the ſeveral cloſes) in the occupation of *F. M.* with a ſimilar reference to a plan annexed, and having the words "*with the appurtenances*" in the habendum. Another conveyance to *D. R.*, from whom another of the plaintiffs claimed, was in the ſame manner as the laſt, deſcribing the cloſes conveyed by names bounds and contents. Another conveyance to *J. Lewin* was like that to the *Meagers*, "for and in reſpect of the meſſuages and tenements farms lands "*grounds* and hereditaments &c, with the like habendum and "reference as the laſt." This deed, amongſt other lands the tithes whereof are ſtill veſted in *Lewin* or in perſons deriving title under him, deſcribes the following piece, the rectorial tithes of which have ſince been purchaſed by the plaintiff *R. Meſſenger* and regularly conveyed to him, viz. "all that piece or parcel of "land at *W.* belonging to *S. F.* and in the occupation of *W. M.* "containing &c. more or leſs." Another conveyance to the plaintiff *G. Shepley* by words exactly the ſame as thoſe uſed in the conveyances to *Chatfield Lane* and *D. R.* of "all and "ſingular the tithes &c. out of for or in reſpect of all thoſe "lands called *Hayling Park* containing &c.; and all that capital "meſſuage or manſion now ſtanding thereon with the outbuild-"ings yard garden and appurtenances thereunto belonging and "appertaining; and all that cottage or tenement called the *Old* "*Plow* with the appurtenances."

By the above conveyance and others of the like nature the tithes of a certain part of the cultivated lands in *Croydon* were conveyed to different purchaſers previous to the marriage of Mr. and Mrs. *Poyntz*. By indentures of leaſe and releaſe of 13th and 14th *January* 1796, Mrs. *Poyntz* in conſideration of her then intended marriage conveyed to truſtees in fee all the ſaid rectory or parſonage impropriate of *Croydon* otherwiſe *Bermondſey*, and all tithes glebe lands oblations obventions profits and perquiſites of what nature or kind ſoever ariſing increaſing or renewing in or within the pariſh of *Croydon* aforeſaid and belonging to the ſaid rectory and which had not been theretofore conveyed away or ſevered therefrom, and the ſcite of the ſaid parſonage with the parſonage barns and homeſtead, ſubject as to a part of the ſaid tithes to two ſeveral contracts and agreements for the ſale and conveyance thereof, upon truſt to ſell and diſpoſe of the ſaid rectory or parſonage and all and ſingular the ſaid tithes and hereditaments in *Croydon* by public auction or private contract. In purſuance of

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the truſt in the above-mentioned ſettlement a public auction was advertiſed for the 6th *November* 1795, when the rectorial tithes of about 834 acres of cultivated ground (being all that remained unſold at the time of the ſaid marriage) were to have been put up to ſale in ſix ſeparate lots under printed particulars and conditions. The particulars after ſpecifying the quantities of land and the compoſition and eſtimated values of the tithes compriſed in each of thoſe ſix lots deſcribed as a ſeventh and laſt lot to be put up "a freehold eſtate conſiſting of the right of tithes over all the common and waſte lands in the pariſh of *Croydon*, except *Waddon Marſh*, containing 2250 acres." The tithes of *Waddon Marſh* containing 235 acres more formed a part of the ſecond lot deſcribed in the ſaid particulars; upon which particulars there was a memorandum that the tithes of a few of the ſmall incloſed fields as well of *Waddon Marſh* as of the other commons did not at that time yield any profit. After this auction had been ſo advertiſed and juſt before it was to have taken place Mr. *Robert Boxall* the perſon named in the pleadings contracted for the purchaſe of the 2d 5th and 7th lots which compriſed the rectorial tithes of 122 acres of incloſed lands beſides *Waddon Marſh* and all the other commons and waſte lands in the pariſh; two other lots the 1ſt and 6th were ſold to other purchaſers; and the remaining two were bought in for the proprietors. By indentures of leaſe and releaſe of 13th and 14th *January* 1796 Mr. and Mrs. *Poyntz* and their truſtees (after reciting in part the above ſettlement) duly conveyed to Mr. *W. Clutton* and his heirs to the uſe of *Clutton* and his heirs during *Boxall*'s life intereſt for ſaid *Boxall* with remainder to the uſe of *Boxall* in fee all and ſingular the tithes &c. ariſing &c. out of upon for or in reſpect of all thoſe ſeveral pieces or parcels of land or ground lying together and compoſing a tract of 15 acres belonging to the archbiſhop of *Canterbury* in the occupation of *Henry Allen* bounded &c., and alſo all thoſe ſeveral pieces &c. deſcribing all the cultivated grounds which were compriſed in the ſaid 2d and 5th lots and delineated in a plan annexed, and alſo all and ſingular the tithes and tenths portions of tithes oblations obventions and fruits and all and every other right title intereſt property compenſation benefit advantage claim and demand whatſoever belonging to or part or parcel of the rectory impropriate of *Croydon* otherwiſe *Bermondſey* aforeſaid yearly or otherwiſe coming ariſing growing accruing increaſing renewing or happening or which at any time or times hereafter ſhould

ſhould or might come ariſe grow accrue increaſe renew or happen out of upon for or in reſpect of all and every the commons and waſte lands and grounds within the pariſh of *Croydon* aforeſaid, containing by eſtimation 2485 acres, and the reverſion &c.

Before and at the time of the ſeveral conveyances of tithes to the plaintiffs and Mr. *Boxall* there were rights of common upon ſome of the waſtes within the pariſh of *Croydon* appurtenant to the reſpective lands deſcribed in each of thoſe conveyances or to parts thereof. Within the pariſh of *Croydon* one moiety of tithe lands is of right payable to the rector impropriate and the other moiety to the vicar, and many of the ewes belonging to the occupiers of ſuch ſeveral lands reſpectively have from time to time as well before as ſince the ſaid conveyances dropped their lambs upon the waſtes whilſt depaſturing there in the exerciſe of ſuch rights of common, and the lambs ſo dropped have continued feeding there with their dams. The *Montague* family having compounded for the rectorial tithes of the beforementioned farms and lands with the ſeveral occupiers thereof received no diſtinct compoſition for the tithes ariſing upon the commons or waſtes. The like compoſitions have been paid to the ſeveral purchaſers of the different lots of the ſaid tithes; and no rectorial tithes ariſing from the commons or waſtes have ever been taken in kind.

The act of the 37 *Geo.* 3. *c.* 144. before referred to, after mentioning who were the lords of the ſeveral different manors within the pariſh, recites (amongſt other things) that Mr. *Poyntz* was entitled to the tithes belonging to the impropriate rectory of *Croydon* otherwiſe *Bermondſey* ariſing within the ſaid pariſh (except thoſe before ſevered and conveyed away), and that an incloſure of the open and common fields &c. therein would be advantageous, and then it appoints the defendant with two other perſons commiſſioners for dividing and allotting the ſame. It directs the manner of their proceeding to aſcertain claims reſpecting rights of common or of tithes or of exemption therefrom or of other intereſt in the land, and enacts that the commiſſioners ſhall ſet out and allot to the perſon or perſons who ſhall be entitled to the rectorial tithes of the ſaid commons &c. intended to be divided and incloſed ſuch parcel of land as ſhall in the judgment of the ſaid commiſſioners be a full equivalent and compenſation for ſuch right; with a proviſo that nothing in the act ſhall alter or in anywiſe affect the rights of any perſon to the rectorial tithes of the incloſed grounds open and common fields lands and common meadows within the pariſh of

1798.

Lord GWYDIR against FOAKES.

Croydon. In conſequence of this act, to which general reference was made in the caſe ſtated, Mr. *Boxall* gave in to the commiſſioners his claims to the rectorial tithes of all the commons marſhes &c. within the pariſh of *Croydon* containing by eſtimation 2485 acres, and which tithes he thereby ſtated to conſiſt of the following particulars, viz. " all corn and grain of every deſcription, all hay clover and all other ſorts of artificial graſs when cut and made into hay, all underwood and loppings of trees and woods, the moiety of all lambs, and all turnips carrots onions and other garden ſtuff ſown upon lands ploughed ;" and Mr. *Boxall* alſo claimed other rights of common &c. in reſpect of other property within the pariſh. The plaintiffs alſo preferred their reſpective claims to the commiſſioners, whereby they claimed ſeparate portions of the rectorial tithes of ſuch commons marſhes &c. in virtue of the ſaid ſeveral conveyances to them; and the plaintiff *Chatfield* made a further claim in virtue of the tithes of another farm called *Plunſums*, for the purchaſe of which he had contracted with the late Lord *Montague* and paid him 768 *l.*, but of which no conveyance had ever been made. The commiſſioners allowed Mr. *Boxall*'s claim and diſallowed thoſe of the different perſons claiming in oppoſition to him; in conſequence of which the preſent action was brought in conformity with the act. The queſtion for the opinion of this Court is, what verdict ought under the circumſtances to be entered on the ſeveral iſſues joined upon the pleadings; and the verdict upon each of them is to be recorded according to that opinion.

Marryat for the plaintiffs. The tithes of the commons which were appurtenant to the ſeveral eſtates conveyed to the plaintiffs paſſed by the conveyances of thoſe eſtates. The queſtions are, whether it was the intention of the parties to thoſe inſtruments that the tithes of the commons ſhould be ſo conveyed, and whether the words uſed are ſufficient for that purpoſe. In ſome of the deeds the words uſed are, " meſſuage or tenement " and farm, and the lands grounds and hereditaments thereunto " belonging or appertaining," the tithes ariſing out of or in reſpect of which are granted: theſe words are amply ſufficient to include the tithes ariſing out of the commons appurtenant to the incloſures. It is true that in ſome of the conveyances the words uſed are not ſo large, as " lands and grounds called *Addiſcome* " *Farm*," but they are ſufficient to paſs the ſame intereſt. It cannot be ſuppoſed to have been the intent of the grantors to

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Lord Gwydir *againſt* Foakes.

ſever the right of the tithes ariſing out of the common as to ſome of the eſtates and not as to others. The word *farm* itſelf is ſufficient to include common appurtenant to the incloſure. In ſome again the conveyance is only of the tithes ariſing out of &c the ſeveral "lands tenements and hereditaments;" but that means the ſame thing: and in ſome inſtances are added to the words of grant the words "with the appurtenances," which are clearly ſufficient to paſs the intereſt in queſtion where they are properly placed; and the only difficulty ariſes from the miſplacing them, being after the grant of the tithes of the land, the parties not conſidering that an incorporeal hereditament, ſuch as the tithes of a right of common, cannot be appurtenant to another incorporeal hereditament, viz. the tithes ariſing out of the incloſed lands. But whatever is incident to land will paſs by the deſcription of land, without the word "*appurtenances*." 2 *Rol. Abr.* 60. A. Common appendant or appurtenant to an eſtate cannot be ſevered, though it may be extinguiſhed or releaſed (*a*); and therefore by a grant of the land to which common is appurtenant, it will paſs, though it be ſpecially reſerved. If there be a modus or exemption for the incloſed land, it will extend to the common. *Lambert* v. *Cumming*, *Bunb.* 138. *Stockwell* v. *Terry*, 1 *Vez.* 118. There were no other tithes but of lambs upon the common before the incloſure, and theſe were payable to the rector; and there is no reaſon for making a diſtinction in this reſpect between the tithes ariſing from the common and from the incloſure, for the ewes and lambs are depaſtured upon both at different times.

Beſt contrà. It is true the intention of the parties muſt govern the conſtruction of the deeds, but that muſt be collected from the deeds themſelves. And it does not appear that the tithes of the common were thought of at the time, otherwiſe they would have been expreſſed in plain apt words like the reſt, which they are not. Nor can it be collected by neceſſary implication that they were intended to paſs: on the contrary the terms uſed are adapted to exclude them. The meaning of the ſeveral terms "farm, lands, &c." relied on is expreſsly confined by ſpecial reference to the lands deſcribed afterwards by bounds quantities and actual occupation; which excludes the comprehenſion of other property not ſpecifically enumerated. The ſeveral places referred to only comprehend the incloſures. The words *land* or *ground* cannot in themſelves convey an incorporeal hereditament. It is true the

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(*a*) Vi. 1 *Bac. Abr.* 620—628. Sed vi. *Bro.* "*Common*," *pl.* 1.

word hereditament, which is uſed in ſome inſtances, is ſufficient to convey a right of common, yet it may properly be applied to corporeal hereditaments only; and the court are to decide from the context in what ſenſe it is here uſed. If it had been uſed *after* the deſcription of the lands intended to be conveyed, then it might be ſuppoſed to have meant ſomething more; but being uſed *before*, the ſignification is bounded by the ſubſequent deſcription of what was intended to be conveyed. So in *Sheph. Touch.* 247. If one grant his manor of D, ſpecifying the townſhips in which it lies, and part of the manor lie in a townſhip not ſpecified, ſuch part will not paſs. So if one have a farm of land called H by leaſe in the pariſhes of A and B, and he reciting his leaſe grant his term and intereſt in the lands called H lying in A and C, this is only good for ſo much as lies in A. The words "*in reſpect whereof*," after the deſcription of *Addiſcombe Farm*, cannot apply to the tithes of the common in contradiſtinction to the tithes which ariſe *out of*, &c. the incloſures, becauſe the whole are confined by the words of reference immediately following to lands bounded and meaſured. And the introduction of the former words may be accounted for in reference to *oblations* &c before enumerated, which do not ariſe *out of* the lands, but are paid *in reſpect of* the occupation of it. By the tithes of the common muſt always be underſtood the tithes ariſing out of the ſoil of the common, which is in the lord: and the act of parliament evidently conſidered the right to the tithes of the common and of the incloſures as ſeparate and independent claims; for diſtinct proviſion is made for each. As to the words "*with the appurtenances*," which are added in ſome of the conveyances, they are only to be found in the habendum, which cannot enlarge the words of grant. But even there they appear to be uſed not with reference to the land itſelf but to the tithes of the land, which can have no appurtenances; and therefore it ſhews that they were inſerted as common words of courſe without any definite meaning. It is true that by a conveyance of lands common appurtenant would paſs without particular words; but that is becauſe common is appurtenant to land: but tithes cannot be appurtenant to tithes, and therefore tithes of a common cannot paſs by a grant of the tithes of incloſures. Neither can they paſs by implication here; for nothing paſſes by implication unleſs it be a neceſſary one, as where the thing expreſsly granted cannot be enjoyed without the other, the grant of which is to be implied. *Archer* v. *Bennett*, 1 *Lev.* 131. and Ld. *Darcy* v. *Aſkwith*, *Hob.* 234. A thing will not paſs by implication merely becauſe it has been uſually enjoyed with another thing granted, if it be not neceſſary to the enjoyment of it. *Sheph. Touch.* 86. The caſe of *Lambert* v. *Cumming*, *Bunb.* 138. does not ſupport the propoſition to the extent for which it was cited: the reaſon on which the common was there holden to be exempt from tithe was, not becauſe it was appurtenant to the incloſures which were exempt, but becauſe both had belonged to a monaſtery, and therefore had an equal right of exemption. Then as to *Stockwell* v. *Terry*, 1 *Vez.* 115. the true ground of that deciſion was ſtated by Lord *Mansfield* in *Moncaſter* v. *Watſon*, 3 *Burr.* 1375., that the modus covered not only the farm itſelf with the appurtenances but the common alſo called the *Down*; and on that account a diſtinction was made between that and the reſt of the waſte. But the laſt-mentioned caſe is directly in point for the defendant, for there the Court held that the exemption and modus for the incloſed lands did not extend to the waſte and common appendant thereto. At any rate the deeds could only operate as a grant of ſuch tithes as could accrue out of the right which the tenants had upon the common at the time before the incloſure, and not as a grant of the tithes which may ariſe out of the ſoil now it is incloſed. Before the paſſing of the act referred to the lord might have incloſed to any extent, leaving ſufficiency of common in excluſion of the tenants. The only right which they then had was to agiſt their cattle; and while the land remained in common the only tithes which could accrue were for agiſtment, and the tithe of lambs dropped on the common: the former is out of the queſtion being a vicarial tithe, the latter only by the uſage was a rectorial tithe. But lambs though dropped on the common are not rectorial tithe *within the common*, but are due in reſpect of the particular incloſures to which the ewes belonged. Thus where the incloſures are in one pariſh, and the waſte appendant or appurtenant is in another, the tithes of lambs dropped on the waſte belong to the rector of the pariſh in which the incloſures lie. The ſame principle muſt govern the conſtruction of this act of parliament made in pari materiâ. At all events the only claim the tenants can make under the act is for an equivalent up to the value of their intereſt in the common: and as the common in its former ſtate produced no rectorial tithe, conſequently it it could not have been in the contemplation of the Legiſlature that they ſhould receive any allotment in reſpect of it.

Lord Kenyon Ch. J. In the pariſh of *Croydon* there appears to have been a large quantity of waſte ground, on which the tenants of the adjoining incloſures had rights of common. Before any incloſure was in contemplation thoſe tenants purchaſed the right to all the tithes of the lay impropriator in reſpect of their ſeveral eſtates; and the conveyances were made in very general terms "of all and all manner of tithes &c. belonging to or parcel "of the rectory impropriate of *Croydon*, coming ariſing &c. out "of and upon for or in reſpect of the ſeveral meſſuages or tene-"ments farms lands" &c. with ſome immaterial variations in the wording of the ſeveral deeds. And now it is contended that the lay impropriator intended to reſerve the tithes in reſpect of the rights of common appurtenant to thoſe eſtates. If the queſtion had been put to him recently after the grants and before the incloſure was in contemplation, it cannot be conceived that he would have advanced ſuch a claim, or that it could have been in the contemplation of any of the contracting parties at the time. It is evidently an afterthought. It muſt be admitted that none of the conveyances do in terms apply to the tithe of the common land: but I cannot infer from thence that they were therefore intended to be excluded. The truth is that it was an object of too little importance to be worth attending to at that time. It is impoſſible however to diſtinguiſh this from the caſe of *Stockwell* v. *Terry*; where an act of parliament having been paſſed for an incloſure of common, founded on an agreement of the parties that the tenants of the incloſure ſhould enjoy all their rights in ſeveralty as they did their rights of common before, a certain portion of the common was allotted to the defendant in lieu of his right of common, and the queſtion was whether this was to be covered by a modus which was paid for it before when in common? And there though the common when incloſed yielded ſeveral ſpecies of tithes which it did not do before, yet Lord *Hardwicke* held that it was covered by the ſame modus. And he ſaid that though the recital in the act of parliament, to which all the parties intereſted had agreed uſed only general words, yet the intention plainly was that every perſon ſhould enjoy his allotment in the ſame manner as he did the thing in lieu, and that having been ſubject to the modus the allotment ſhould be ſo ſtill. Then the caſe of *Moncaſter* v. *Watſon*, ſo far from contravening that doctrine as is ſuppoſed, affects to follow and adopt it. The caſe indeed there was different, becauſe the modus was confined to the demeſne lands and did not extend or affect to extend to the common. Upon the whole I am ſatisfied that there was no intention in the parties to theſe ſeveral conveyances to exclude the tithes of the common; and I think that the general words of grant uſed are ſufficient to carry them.

ASHHURST J. The words of grant uſed are comprehenſive enough to paſs every ſpecies of tithe; and I ſee no ground for ſuppoſing that the parties intended to make a diſtinction between the tithes of the common and thoſe of the incloſures.

GROSE J. The queſtion is whether the rectorial tithes ariſing out of the rights of common were conveyed by the ſeveral deeds ſet forth in the caſe. The words of grant uſed are very large and ample; they are of the tithes ariſing &c. out of or in reſpect of the ſeveral meſſuages or tenements, farms, lands, and hereditaments. Now without relying upon the laſt-mentioned word *hereditaments* I conſider the right of common as part of the *land* to which it is appurtenant, and that all tithes were meant to be conveyed which aroſe out of or in reſpect of the land, and therefore the tithe of the common amongſt the reſt. I alſo conſider the right of common as neceſſarily implied under the word *farm*. Therefore there being no apparent intention not to paſs theſe particular tithes, and the words being large enough to convey all the tithes, there is no ground for ſaying that the tithes of the common did not paſs with the reſt.

LAWRENCE J. The evident meaning of the parties was that whatever tithes the tenants of the eſtates were liable to pay, whether more or leſs, ſhould be conveyed to them; and the ſmall value of the tithes ariſing out of the common before the incloſure cannot vary the queſtion. The quantum of the allotments in lieu of the former rights is a queſtion for the commiſſioners.

Poſtea to the plaintiffs.

Tueſday, May 15th.

S. Harton and B. Harton Widow *againſt* W. H. Harton and Another.

A deviſe of lands to truſtees and their heirs upon truſt to permit a feme covert to receive and take the rents and profits during her life for her ſole and ſeparate uſe, and after her deceaſe to the uſe of the firſt and other ſons of her body, then to the daughters as tenants in common with other like limitations to other femes coverts, veſts the legal eſtate in the truſtees.

The following caſe was ſent by the Lord Chancellor for the opinion of this Court.

Samuel Jaques deceaſed being ſeiſed in fee of ſeveral freehold and copyhold eſtates, and having ſurrendered the copyhold to the uſe of his will, by his will dated 27th *November* 1767, duly executed and atteſted to paſs lands, deviſed to the defendant *John Crozier* and *John Lightfoot* ſince deceaſed and their heirs all his meſſuages lands tenements and hereditaments in the pariſh of *Iver* in the county of *Bucks* and at *Pinner* in the county of *Middleſex* with their appurtenances, upon truſt to permit and ſuffer his niece the plaintiff *Bridget Harton*, then the wife of *William Harton*, to receive and take the rents and profits of all the ſaid premiſes during her life for her own ſole and ſeparate uſe, notwithſtanding her coverture, and without being in anywiſe ſubject and liable to the debts management power or control of her then or any after-taken huſband, and her receipt alone from time to time to be a ſufficient diſcharge for the ſame; and after her deceaſe then to the uſe of the firſt ſon of the body of his ſaid niece *Bridget Harton* lawfully begotten and the heirs of his body lawfully iſſuing; and for want of ſuch iſſue then to the uſe of the 2d, 3d, 4th, 5th, and every other ſon and ſons of his ſaid niece *Bridget Harton* lawfully begotten, and the heirs of their reſpective bodies lawfully iſſuing, ſucceſſively as they ſhould be in ſeniority of age and priority of birth, the eldeſt of ſuch ſons and the heirs of his body being always to be preferred and taken before the younger of ſuch ſons and the heirs of his body; and in default of ſuch iſſue to the uſe of all and every the daughter and daughters of his ſaid niece *Bridget Harton* lawfully begotten and the heirs of their reſpective bodies lawfully iſſuing, to take as tenants in common and not as joint tenants; and in default of ſuch iſſue of his ſaid niece *Bridget Harton* the ſaid teſtator deviſed the ſaid eſtates, without inſerting any new limitation, upon further truſt to permit and ſuffer his niece *Anna Maria* then the wife of *J. Hogard* to take the rents and profits of all the premiſes deviſed to the ſaid *Bridget Harton* as aforeſaid during her life for her ſeparate uſe, in like manner and with ſuch remainders over to to the uſe of the firſt and other ſons of his ſaid niece *Anna Maria* in tail, with remainder to her daughters in tail, as tenants in common, as the ſaid premiſes are and ſtand limited above in truſt for his ſaid niece *Bridget Harton* for her life and to the uſe of the iſſue of her body in tail; and in default of ſuch iſſue as aforeſaid of his ſaid niece *Anna Maria*, then upon further truſt to permit and ſuffer his niece *Sarah Jaques* ſpinſter to receive and take the rents and profits of all and ſingular the ſaid premiſes during her life for her ſole and ſeparate uſe, in like manner and with ſuch remainders over to the uſe of the firſt and other ſons of his ſaid niece *Sarah Jaques* in tail, with remainder to her daughters in tail, as tenants in common, as the ſaid premiſes are and ſtand limited above in his ſaid will in truſt for his ſaid nieces *Bridget Harton* and *Anna Maria Hogard* reſpectively for life, with remainder to the uſe of the iſſue of their reſpective bodies in tail; and in default of ſuch iſſue as aforeſaid of his ſaid niece *Sarah Jaques*, to the uſe of his couſin *Samuel Plumb* Eſq. and the heirs of his body lawfully begotten; and in default of ſuch iſſue to his (the deviſor's) own right heirs for ever. The deviſor died ſeiſed on 18th *June* 1771 without having revoked or altered his ſaid will, and left the ſaid plaintiff *Bridget Harton* his heir at law and cuſtomary heir. The plaintiff *Samuel Harton* is the firſt ſon of the body of the ſaid plaintiff *Bridget Harton*, and the defendant *William Henry Harton* is the ſecond ſon of her body. The defendant *John Crozier* is the ſurviving truſtee in the ſaid will, *John Lightfoot* his co-truſtee therein named being dead. The queſtions were, whether by the will of *S. Jaques* of the 27th *November* 1767 the firſt ſon of the body of *Bridget Harton* took a legal remainder in tail in the eſtates thereby deviſed, or whether *John Crozier* and *John Lightfoot* the truſtees took a fee-ſimple in the premiſes by the ſaid will.

Law for the plaintiffs mentioned the caſe of *South* v. *Alleine* (*a*) as the only one like this caſe upon which he could build any argument in favour of the plaintiffs: but being preſſed by the Court as to the authority of that caſe, he admitted that it could not hold, as without adjudging the legal eſtate to be in the truſtees the intereſts of the ſeveral femes coverts would not be ſecured, and ſo the intention of the deviſor might be defeated.

Lord KENYON C. J. Whether this be a uſe executed in the truſtees or not muſt depend upon the intention of the deviſor, which

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(*a*) *Salk.* 228. See the report of the ſame caſe under the name of *Buſh* v. *Allen* in 5 *Mod.* 63.

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HARTON *againſt* HARTON.

which is to be collected from the will. This proviſion, it appears, was made in order to ſecure to the ſeveral femes coverts a ſeparate allowance free from the control of their huſbands, to effectuate which it is eſſentially neceſſary that the truſtees ſhould take the eſtate with the uſe executed, otherwiſe the huſband of each taker would be entitled to receive the profits, and ſo defeat the very object that the deviſor had in view.

The other Judges concurred, and

LAWRENCE J. mentioned the caſe of *Jones* v. Lord *Say* and *Seal*, 1 *Eq. Abr.* 383. where the deviſe was to truſtees and their heirs in truſt to pay ſeveral legacies and annuities, and to pay the ſurplus to a feme covert for life to her ſeparate uſe or as ſhe ſhould direct, and after her death the truſtees to ſtand ſeiſed to the uſe of the heirs of her body with remainder over, it was holden that by the words of the will the uſe was executed in the truſtees and their heirs during the life of the feme covert, and after her death it was executed in the perſons entitled to take, charged with the annuities.

Lord KENYON C. J. ſaid that *Jones* v. Lord *Say* and *Seal* was a caſe by itſelf. The beſt report of it was in *Viner's Abr.* (8 vol. 262.) and it was recogniſed to be law by Lord *Hardwicke* in *Bagſhaw* v. *Spencer* (a).

The following certificate was afterwards ſent to the Lord Chancellor;

We have heard this caſe argued by counſel, and are of opinion that the legal eſtate by way of uſe executed in fee ſimple veſted in *John Crozier* and *John Lightfoot*; that conſtruction being neceſſary (as we conceive) to give legal effect to the teſtator's intention, to ſecure the beneficial intereſt to the ſeparate uſe of the ſeveral femes coverts.

KENYON,
W. H. ASHHURST,
N. GROSE,
J. LAWRENCE.

(a) Vid. 1 *Vez.* 144.

Tueſday, May 15th.

CROWTHER *againſt* RAMSBOTTOM and Others.

In treſpaſs for breaking and entering the plaintiff's cloſe and taking his goods, the defendant may juſtify under a ſufficient legal proceſs if he had it in fact at the time, although he declared then that he entered for another cauſe.

THIS was an action for breaking and entering the plaintiff's cow-houſe, and taking away three cows, and converting them to the defendant's uſe. The 2d count was for ſeizing the cattle and detaining them four days, whereby the plaintiff loſt the uſe

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uſe of them, and was put to trouble and expence in getting them back again.

The defendant pleaded 1ſt not guilty. 2dly That before the time when &c. a writ of juſticies iſſued out of the Chancery Court of the county Palatine of *Lancaſter* againſt the plaintiff at the ſuit of one *John Scholſield* directed to the ſheriff of the ſaid county, which ſaid writ was delivered to the ſaid ſheriff to be executed in due form of law; that the ſaid ſheriff duly iſſued his precept under the ſeal of his office directed to the defendants, commanding them to attach the plaintiff by his goods ſo that he ſhould appear at the then next county court to anſwer *Scholſield*; that ſuch precept was delivered to them, by virtue whereof they peaceably entered the cow-houſe (the door being then open) and took the cattle in order to attach the plaintiff by his goods to appear as aforeſaid to anſwer &c. according to the exigency of the ſaid writ and precept; and for that purpoſe the defendants, as ſuch bailiffs as aforeſaid, ſeized and took the cattle and detained the ſame for the time mentioned in the declaration; at the expiration of which time the plaintiff having appeared &c. the cattle were re-delivered to him.

Replication admitting that the writ of juſticies did iſſue in manner and form &c., yet alleges that the defendants of their own wrong and without the reſidue of the cauſe by them pleaded in bar broke and entered the cow-houſe and took and drove away the cattle and detained the ſame in manner and form as ſtated in the declaration; on which iſſue was joined.

At the trial before *Rooke* J. at the laſt ſummer aſſizes for *Lancaſter* it appeared that when the defendants, one of whom was a bailiff, and the others his aſſiſtants, came to the plaintiff's houſe with the proper warrant ſtated in the ſaid plea, the plaintiff's ſervant was milking the cows in the cow-houſe adjoining; that one of them knocked her down, overturned the milk-pan and drove away three cows; that upon being aſked what they took the cows for, *Ramſbottom* ſaid that he was a ſheriff's officer and was come for the cows again (*a*) for 7 *l.* debt and 5 *l.* coſts for *John Scholſield*; and if any attempt were made to hinder him, he would carry the party before a juſtice; and he ſhewed his warrant. On the ſame day that the cattle were taken the plaintiff's attorney applied to the defendants and tendered them 2*s.* 6*d.* and demanded to have them reſtored. It appeared to be the uſual

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(*a*) It happened that they had been taken once before on a ſimilar occaſion.

uſual practice in theſe caſes to attach the party in order to compel an appearance by any ſmall chattel, and to return it on paying 2 *s.* 4 *d.*, which is conſidered by the officer of the county court as an appearance, and the entry made accordingly. The cows were reſtored on the fourth day after they were taken. On this evidence the learned Judge left it to the jury to ſay whether the defendants entered for the mere purpoſe of compelling an appearance, or whether for the purpoſe of compelling the plaintiff to pay the debt and coſts; obſerving that they refuſed to accept the uſual fee for an appearance, and that they took as many as three cows, declaring that they took them for the 7 *l.* debt and 5 *l.* coſts. The jury found a verdict for the plaintiff with 20 *l.* damages.

Topping moved for a new trial in *Michaelmas* term laſt on two grounds; 1ſt, becauſe the verdict was againſt law and evidence. 2d, Becauſe the evidence received of the tender of money by the plaintiff after the taking of the cattle was not relevant to the iſſue, which was whether the cattle were or were not taken under a lawful authority.

Law and *Evans*, who ſhewed cauſe in *Hilary* term laſt, obſerved that it would be nugatory to grant a new trial, becauſe it appeared upon the record that the juſtification ſet up by the defendants was bad in point of law; 1ſt, becauſe the firſt proceſs under a juſticies is a ſummons and not an attachment, as here pleaded. *Hargrave* v. *Ward* and others, 2 *Lutw.* 1454. 2 *Com. Dig.* tit. *County-Proceſs.* 471, 472. 4 *Com. Dig.* tit. *Pleader,* (3 M.) 24. though if it had been pleaded generally, quod taliter proceſſum fuit that a capias iſſued the Court will intend that the previous proceedings were regular. *Adams* v. *Freeman*, 2 *Wilſ.* 5. 2dly, The defendants upon their own ſhewing are guilty of an exceſs in taking three cows in order to compel an appearance, which is not juſtifiable. *Hargrave* v. *Ward*, 2 *Lutw.* 1457. 1 *Rol. Abr.* 674. (R.) 3dly, It is not ſhewn that the proceſs was executed within the juriſdiction of the inferior court. 4 *Com. Dig.* 323. tit. *Pleader*, (3 M.) 24. 3 *Lev.* 243. 4thly, It is a returnable proceſs, and not ſhewn to be returned. *Middleton* v. *Price*, 2 *Stra.* 1184. Though in *Britton* v. *Cole*, *Salk.* 904. it is ſaid to be enough for the ſheriff's bailiff to ſhew a writ of execution (*a*).

(*a*) But the Court would not enter into the conſideration of the queſtions ariſing on the pleadings on a motion for a new trial.

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At all events they contended that if it appear upon the whole that juſtice has been done the Court will not grant a new trial, though there may have been a miſdirection in point of law, according to *Edmonſon* v. *Machell*, *ante*, 2 vol. 4. And here it appears that the defendants were guilty of brutality and unneceſſary violence in the manner of executing the proceſs, and of oppreſſion in taking three cows where one was amply ſufficient for the purpoſe.

Another queſtion aroſe upon the replication, whether ſuppoſing the plea of juſtification to be good in point of form the plaintiff, if he meant to inſiſt that the defendants entered for another purpoſe than that by them alleged, ſhould not have replied ſpecially; and this was the point principally ſpoken to on this day, the argument having been adjourned from the laſt term.

It was contended that it was open to the jury to conſider whether the entry and ſeizure were for the purpoſe alleged by the defendants, or for the purpoſe, as they thought it was, of extorting money from the plaintiff under the terror and oppreſſion of an exceſſive diſtreſs; one of the defendants having in effect admitted at the time that he did the act for the purpoſe of compelling the payment. The replication puts in iſſue every material fact in the defendant's plea; and the rule is laid down in *Crogate*'s caſe, 8 *Rep.* 67. and in *Jones* v. *Kitchen*, 1 *Pull.* and *Boſ.* 76. that where a plea merely ſets up matter of excuſe and does not claim an intereſt or property, there the general replication de injuriâ ſuâ propriâ abſque tali cauſâ is ſufficient. A new aſſignment can only be neceſſary where the act of treſpaſs is completely juſtified by the plea. But here it appears from the evidence that a material allegation in the plea of juſtification was falſe, namely, that they entered and ſeized the cattle *in order to enforce the proceſs*; for it was proved that they went to extort money colore officii. The evidence which was admitted of the uſage of the county court to receive a ſmall ſum by way of entering an appearance to a juſticies was not received as evidence per ſe to prove that the taking became illegal by an act ſubſequent; but it was admitted to ſhew quo animo the original entry and ſeizure were made; it was part of the ſame tranſaction, and as ſuch was evidence.

Gibbs and *Topping* contrà were ſtopped by the Court.

Lord KENYON C. J. I never underſtood that a man was obliged to juſtify a diſtreſs for the cauſe which he happened to aſſign at the time it was made. If he can ſhew that he had a legal

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juſtification for what he did that is ſufficient. A man may diſtrain for rent, and avow for heriot ſervice (*a*). Now here it appears that the defendants were juſtified under the proceſs of the county court in entering upon the plaintiff and taking his goods in order to compel an appearance; and therefore the queſtion ought not to have been left to the jury to ſay whether they entered for that or ſome other cauſe. Then as to the exceſs of the diſtreſs taken, an action on the caſe lies for that on the ſtatute of *Marlbridge*; but that will not warrant an action of treſpaſs. This queſtion was conſidered in the caſe of *Hutchins* v. *Chambers* (*b*); and the rule was then ſettled. Though it was ſaid that there was one excepted caſe, namely where gold or ſilver was taken to an exceſs apparent on the face of it; as where ſix ounces of gold and 100 ounces of ſilver were taken for 6*s.* 8*d.*: but that went on the ground that gold and ſilver were of a certain known value, and the meaſure of the value of other things. Here the verdict having proceeded on a miſtake of the law, there muſt be a new trial.

Ashhurst and Grose, Juſtices, were of the ſame opinion.

Lawrence J. The caſe of Dr. *Grenville* v. *The College of Phyſicians* (*c*), which came on upon demurrer, is directly in point. In treſpaſs againſt *J. S.* for an aſſault and wounding and falſe impriſonment, the defendant as to the force and arms and wounding pleaded not guilty; and as to the reſidue of the treſpaſs he juſtified it under the authority of the cenſors of the College for mal-practice by the plaintiff in his profeſſion of a phyſician. The plaintiff replied that the defendant de injuriâ &c made the aſſault, abſque hoc that he did it by the authority ſet forth in the plea. And upon demurrer the replication was held ill: and *Holt* C. J. ſaid "ſuppoſe one has a legal and an illegal warrant, and arreſts "by virtue of the illegal warrant, yet he may juſtify by virtue of "the legal one; for it is not what he declares, but the authority "which he has, is his juſtification." Now that very queſtion was left by the learned Judge to the jury in this caſe which was there ſtated to be immaterial. For it was not material to inquire what the defendants ſaid when they entered and ſeized, but only whether they had in fact a legal warrant to juſtify them.

Rule abſolute.

(*a*) Vi. *Fitz. Avowry* 232. 3 *Co.* 26.

(*b*) 1 *Burr.* 579.

(*c*) 12 *Mod.* 386.

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Wedneſday, May 16th.

PEDDELL *againſt* KIDDLE.

In treſpaſs quare clauſum fregit, if the defendant plead not guilty, and a juſtification which does not make title to the land, upon which iſſues are joined which are found for the plaintiff with damages under 40*s.*, ſtill the plaintiff is entitled to full coſts.

To treſpaſs for breaking and entering the plaintiff's cloſe, the defendant pleaded firſt the general iſſue, and 2dly a licenſe from the plaintiff. The plaintiff traverſed the licenſe, and new aſſigned. The defendant took iſſue on the traverſe, and pleaded not guilty to the new aſſignment.

The plaintiff having recovered a general verdict with 1*s.* damages, and the Maſter having allowed him only 1*s.* coſts, the queſtion was whether or not he was entitled to full coſts. It was argued at great length at the bar and all the former caſes were cited.

Burrough, who moved that the Maſter might be directed to allow the plaintiff his full coſts, relied on *Redridge* v. *Palmer*, 2 *H. Bl. Rep.* 2, and *Comer* v. *Baker*, *ib.* 341, in which all the prior deciſions are ſtated, and in which it was ruled that the plaintiff is entitled to full coſts in all caſes where the defendant pleads a juſtification in treſpaſs which is found againſt him.

Praed contrà took an accurate review of all the former caſes to ſhew that they did not warrant the general concluſion drawn from them in the two laſt caſes in the court of Common Pleas, and contended that according to the words and ſpirit of the 22d *Car.* 2. *c.* 9. a plaintiff who recovers leſs than 40*s.* damages in treſpaſs quare clauſum fregit is not entitled to full coſts unleſs the freehold or title appear to have come in queſtion either by the Judge's certificate or by the pleadings; and that in this caſe as the title was not in queſtion on the pleadings, as the Judge had not certified that it was in queſtion at the trial, and as it might have been queſtioned on the general iſſue, the Maſter had done right in refuſing to allow more coſts than damages.

The *Court* ſaid they wiſhed to look into the caſes; and now Lord KENYON C. J. delivered the opinion of this Court.

The Maſter, guided by the experience of many years, has informed us that he ſhould have taxed the plaintiff in this caſe his full coſts as a matter of courſe, if the defendant had not told him that he ſhould take the opinion of the Court on the queſtion. We find alſo on inquiry that the prothonotaries of the court of Common Pleas would have allowed full coſts in ſuch a caſe as the preſent as a matter of courſe. And indeed it is now rather late to

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to canvaſs this queſtion at the diſtance of 130 years from the time of paſſing the ſtatute. The ſtatute 22 and 23 *Car.* 2. *c.* 9. enacts that in all actions of treſpaſs &c wherein the judge at the trial of the cauſe ſhall not certify under his hand upon the back of the record that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in queſtion, the plaintiff in caſe the jury ſhall find the damages to be under the value of 40*s.* ſhall not recover more coſts of ſuit than the damages &c. The words of that act have always received a ſtrict conſtruction. When an action de bonis aſportatis has been brought, full coſts have always been allowed to the plaintiff, notwithſtanding he may have recovered leſs than 40*s.*, not becauſe the ſtatute has ſaid he ſhould have full coſts, but becauſe the caſe is not within the act. We have looked into the caſes cited in the argument, and we find that this queſtion has been ſettled again and again. In *Redridge* v. *Palmer*, Lord *Loughborough*, who delivered the opinion of the court of Common Pleas after examining all the authorities, ſaid "The rule therefore which had ſo long prevailed both in this Court and in the King's Bench, namely, that where there was a ſpecial plea of juſtification found againſt the defendant the plaintiff was entitled to his full coſts, ought not to be overturned." So in the caſe of *Comer* v. *Baker* the court of Common Pleas adopted the ſame rule, relying on the uniform practice that had ſo long prevailed. The principle on which thoſe determinations were founded is that where the caſe is ſuch that the Judge who tries it cannot in any view of it grant a certificate within the act, it is conſidered to be a caſe out of the ſtatute. Here was a plea of licenſe, upon which the queſtion could not ariſe whether or not the defendant had a title to the land: the queſtion was whether or not he had liberty to go over the land; therefore the caſe was not within the ſtatute.

On the authority therefore of theſe caſes, and on the practice which has uniformly prevailed in all the courts, we think that the plaintiff is entitled to his full coſts, and that it would be dangerous now to allow any innovation to be made on a point that is ſo thoroughly ſettled as this is.

Rule abſolute.

The KING *againſt* DYDE and another.

Friday, *May* 18th.

A defendant in a caſe where the King is party cannot carry down the niſi prius record to trial by proviſo.

THESE were two indictments for miſdemeſnors preferred by the Attorney-general at the ſeſſions of *Oyer* and *Terminer* for the county of *Middleſex* on the 20th *June* 1796; the firſt for ſending goods to *France* againſt the 34 *Geo.* 3. *c.* 9. *ſ.* 2., and the other for embarking in a veſſel to go to *France* againſt the 33 *Geo.* 3. *c.* 27. *ſ.* 3. In *Michaelmas* term 1796 the defendants pleaded, and notice of trial was given on the part of the Crown for the ſittings after that term, which was afterwards countermanded. A rule was obtained on a former day in this term calling on the proſecutor to ſhew cauſe why the defendants ſhould not be at liberty to proceed to trial by proviſo at the ſittings at niſi prius after this term in *Middleſex*; againſt which

Law, *Garrow*, and *Wood*, now ſhewed cauſe; ſaying that it was an eſtabliſhed rule that a defendant cannot in any caſe in which the King is party, unleſs by his aſſent, carry down the record to trial by proviſo, becauſe no laches can be imputed to the King; and they cited *R.* v. Sir *Jacob Banks*, 6 *Mod.* 247. and 2 *Inſt.* 424.

Erſkine contrà admitted that the rule could not be ſupported. And

Per Curiam, Rule diſcharged.

FORES *againſt* DIEMAR.

Monday, *May* 21ſt.

The chriſtian names as well as ſurnames of the parties muſt be inſerted in the title of an affidavit produced to ſhew cauſe againſt any rule.

ONSLOW was proceeding to ſhew cauſe againſt a rule for ſetting aſide the proceedings in this caſe for irregularity, but

Dampier, for the defendant, objected to the affidavit on which he was to have ſhewn cauſe being read, becauſe it was not properly intitled, it having only the ſurnames, not the chriſtian names, of the parties. And he obſerved that the object of the rule, which requires the names to be prefixed to ſuch an affidavit, was that in the event of an indictment for perjury on ſuch an affidavit, it might appear by the affidavit itſelf that it was filed in the particular cauſe without the aid of any extrinſic averment.

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The Court were of opinion that this was a deciſive objection to the affidavit. And then the rule was made abſolute, no cauſe being ſhewn againſt it.

Rule abſolute.

In this Term Baker John Sellon Eſq. was called to the degree of Serjeant at Law. The motto on his rings was "*Reſpice quid moneant leges.*"

THE END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

BAUERMAN and Another *againſt* RADENIUS.

Saturday, June 9th.

The defendant may give in evidence the declarations or admiſſions of the plaintiff on the record to defeat the action, although ſuch plaintiff appear to be only a truſtee for a third perſon.

THIS was an action on the caſe, wherein the declaration ſtated that in conſideration that the plaintiffs had ſhipped on board a certain veſſel then lying at *Embden*, and whereof the defendant was maſter, certain goods to be carried from thence to *London* there to be delivered in good condition and dry (except in caſe of inevitable damage or leakage) to Meſſrs. *Van Dyck* and Co. for a certain reaſonable freight to be paid to the defendant, the defendant promiſed to carry and deliver the ſame accordingly; that the ſhip with the goods arrived ſafely from *Embden* at *London*; and although Meſſrs. *Van Dyck* and Co. paid the freight for the ſame, yet the defendant did not deliver the goods in good condition and dry, although not prevented from ſo doing by inevitable damage or leakage, but on the contrary delivered the ſame wet and ill-conditioned, and the ſaid goods were through the neglect and default of the defendant much damaged and ſpoiled &c. To this the general iſſue was pleaded.

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At the trial before Lord *Kenyon* at *Guildhall* much evidence was at firſt gone into in order to ſhew that the injury aroſe from the unſkilful ſtowing of the goods on board the veſſel, and not from the inevitable danger of the ſea as the defendant endeavoured to eſtabliſh. But the principal queſtion aroſe on the production in evidence by the defendant of a letter from the plaintiffs, who were the ſhippers of the goods to *Van Dyck* and Co., entirely exculpating the defendant from all blame or imputation of negligence or miſconduct, and ſtating that he acted in every reſpect according to their (the plaintiffs') orders by ſtowing the goods under their direction. But it alſo appeared in the ſame letter that *Van Dyck* and Co. were the perſons on whoſe riſk the goods were ſhipped, that they were the perſons really intereſted in the ſuit, and had indemnified the plaintiffs their agents in whoſe name they had brought this action. Whereupon it was contended at the trial in ſupport of the action that as it was diſcloſed that *Van Dyck* and Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admiſſions of their agents proved too by letter without the ſanction of an oath, and that therefore this evidence ought to be rejected: but Lord *Kenyon* being of a different opinion, the plaintiff was nonſuited.

Gibbs and *Park* moved yeſterday to ſet aſide the nonſuit. The principle has been eſtabliſhed in ſeveral caſes that it is competent to a court of law to recognize the real parties to a ſuit, though they are not the nominal parties on the record; and when it is ſhewn who the real parties are, the cauſe ought to be tried in the ſame manner as if they were brought formally before the Court. In *Winch* v. *Keeley* (*a*) the principal caſe determined was that the aſſignor of a choſe in action who had become a bankrupt might notwithſtanding maintain an action in his own name againſt the debtor for the benefit of the aſſignee. That indeed proceeded on the ground that a mere truſt did not paſs by an aſſignment under the bankrupt laws: but a caſe was there cited and recognized by the Court, which eſtabliſhed the poſition that a court of law might take notice of a truſt and conſider who the real parties were. That was a caſe of *Bottomley* v. *Brook*, *M.* 22 *Geo.* 3. C. B., where to debt on bond the defendant pleaded that the bond was given for ſecuring 100 *l.* lent by the defendant to one *E. Chancellor* and given by her direction to the plaintiff in truſt for her; and that *E. C.* before the action

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(*a*) *Ante*, 1 vol. 619.

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brought was indebted to the defendant in more money than the amount of the bond. The plaintiff, having demurred, afterwards withdrew his demurrer by advice of the Court. The ſame caſe was alſo recognized by this Court in another of *Rudge* v. *Birch*, *M.* 25 *Geo.* 3. where to debt on bond the defendant pleaded that the bond was given to the plaintiff in truſt for *A*, and that *A* at the time of exhibiting the plaintiff's bill was indebted to the defendant in more money; and this was holden good on demurrer. If theſe caſes be law, they govern the preſent: for if the Court will recognize the real litigant parties, and if the declarations of the agents of *Van Dyck* and Co. would not have been evidence againſt them if they had been plaintiffs on the record, which they certainly would not, notwithſtanding what was ſaid in *Biggs* v. *Lawrence* (*a*); ſo neither can they be received in evidence as it was proved that the nominal plaintiffs were mere truſtees, and not the parties really intereſted in the ſuit. That part of the caſe of *Biggs* v. *Lawrence* paſſed without much obſervation, and was not the principal point; and Lord *Kenyon* has frequently ruled the contrary at the ſittings ſince that time without its having ever been queſtioned. The anſwer given in ſuch caſes has always been that the agent himſelf might have been ſubpœnaed as a witneſs, and therefore what he has been heard to ſay cannot be evidence, as not being the beſt. There muſt be reciprocity in the rule. If a defendant may ſhew who the real plaintiff is, though not the plaintiff on the record, for the purpoſe of ſetting off a debt due from the real party, or of giving in evidence declarations of that party, ſo the real party ought to have the privilege of diſcloſing himſelf, ſo as not to be bound by the declarations of the nominal plaintiff, which if he had not been ſuch could not have been given in evidence as the declarations of a mere agent. If it be objected that by theſe means the defendant is precluded from calling the agent in whoſe name the action is brought as a witneſs, the anſwer is that the ſame effect would be produced in the caſes of ſet-off where the objection was not admitted to prevail. In a caſe of *Dyke* v. *Aldridge* before Lord *Mansfield*, where one of the parties was a ſheriff who was indemnified by a third perſon, Lord *Mansfield* permitted the declarations of that third perſon to be given in evidence againſt the ſheriff.

Erſkine, *Garrow*, and *W. Walton*, now ſhewed cauſe. The caſes cited of *Bottomley* v. *Brook* and *Rudge* v. *Birch*, ſuppoſing them to be

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(*a*) *Ante*, 3 vol. 454.

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be good law, do not come up to the point in diſpute: they were a conſtruction upon the ſtatutes of Set-off, which have always been liberally expounded to advance the remedy and repreſs circuity of actions. But it does not follow that, becauſe a debt againſt the real party to the action may be ſet off, therefore the declarations of the plaintiff on record ſhall not be received in evidence. In thoſe caſes alſo the truſt appeared on the face of the record, ſo that there could be no ſurpriſe on the defendant; but here the defendant has no notice but that he is ſued by the real party, and conſequently prepares his defence accordingly. If this evidence were not admitted the principal might always obtain an advantage over a defendant who dealt with his agent, by bringing his action in the name of the latter to prevent his being a witneſs for the defendant, while the defendant would be precluded from giving the declarations of the agent in evidence againſt the principal. The agent then would be plaintiff ſo far as operated to the diſadvantage of the defendant, and a ſtranger to the ſuit where it would operate to the defendant's advantage that he ſhould be plaintiff. In a caſe before Lord *Mansfield* (*a*) an action was brought in the name of a nominal plaintiff by perſons beneficially intereſted for whom he was a truſtee. At the trial the defendant produced a releaſe from the plaintiff, which Lord *Mansfield* held concluſive; but ſaid that the Court of Chancery upon application would make the truſtee pay the principal debt, if well founded, and the coſts of the ſuit. Beſides, this was evidence on another ground; for the plaintiffs as agents were entruſted with the ordering and conduct of theſe goods as to the manner of their being ſhipped; and if the defendant followed their directions the principal muſt be bound by their acts: and what can be ſtronger evidence that the orders which they gave were implicitly complied with than their own acknowledgment in writing to that effect? It is not pretended that the letter is not evidence to ſome purpoſe, and if admitted in evidence at all, its whole contents muſt be received.

Lord KENYON Ch. J. This was an action brought by *Bauerman* and Co. againſt the defendant *Radenius*; and in the courſe of the trial an admiſſion by the plaintiffs themſelves was proved that there was no colour for the action, which admiſſion was not fraudulently obtained from them but was the opinion that the plaintiffs really entertained on the merits of the caſe. And

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(*a*) This was cited by Mr. *Erſkine* from his recollection of the caſe.

the only queſtion now is whether or not that ought to conclude the caſe againſt the plaintiffs who made the admiſſion. It was ſaid by a very learned Judge, Lord *Macclesfield*, towards the beginning of this century that the moſt effectual way of removing land marks would be by innovating on the rules of evidence; and ſo I ſay. I have been in this profeſſion more than 40 years, and have practiſed both in courts of law and equity; and if it had fallen to my lot to form a ſyſtem of juriſprudence, whether or not I ſhould have thought it adviſable to eſtabliſh two different courts with different juriſdictions, and governed by different rules, it is not neceſſary to ſay. But, influenced as I am by certain prejudices that have become inveterate with thoſe who comply with the ſyſtems they found eſtabliſhed, I find that in theſe courts proceeding by different rules a certain combined ſyſtem of juriſprudence has been framed moſt beneficial to the people of this country, and which I hope I may be indulged in ſuppoſing has never yet been equalled in any other country on earth. Our courts of law only conſider legal rights: our courts of equity have other rules, by which they ſometimes ſuperſede thoſe legal rules, and in ſo doing they act moſt beneficially for the ſubject. We all know that, if the courts of law were to take into their conſideration all the juriſdiction belonging to courts of equity, many bad conſequences would enſue. To mention only the ſingle inſtance of legacies being left to women who may have married inadvertently: if a court of law could entertain an action for a legacy, the huſband would recover it, and the wife might be left deſtitute: but if it be neceſſary in ſuch a caſe to go into equity, that court will not ſuffer the huſband alone to reap the fruits of the legacy given to the wife; for one of its rules is that he who aſks equity muſt do equity, and in ſuch a caſe they will compel the huſband to make a proviſion for the wife before they will ſuffer him to get the money. I exemplify the propriety of keeping the juriſdictions and rules of the different courts diſtinct by one out of a multitude of caſes that might be adduced. If the parties in this caſe had gone into equity, and that court had directed an iſſue to be tried, they might have modified it in any way they thought proper. One of the rules of a court of equity is that they cannot decree againſt the oath of the party himſelf on the evidence of one witneſs alone without other circumſtances: but when the point is doubtful, they ſend it to be tried at law, directing that the anſwer of the party ſhall be read on the trial;

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ſo they may order that a party ſhall not ſet up a legal term on the trial, or that the plaintiff himſelf ſhall be examined; and when the iſſue comes from a court of equity with any of theſe directions the courts of law comply with the terms on which it is ſo directed to be tried. By theſe means the ends of juſtice are attained, without making any of the ſtubborn rules of law ſtoop to what is ſuppoſed to be the ſubſtantial juſtice of each particular caſe; and it is wiſer ſo to act than to leave it to the judges of the law to relax from thoſe certain and eſtabliſhed rules by which they are ſworn to decide. If the queſtion that has been made in this caſe had ariſen before Sir *M. Hale*, or Lords *Holt* or *Hardwicke*, I believe it never would have occurred to them ſitting in a court of law that they could have gone out of the record and conſidered third perſons as parties in the cauſe. Here it has been contended that *Bauerman* and Co. are to be laid out of the caſe entirely, and we are deſired to ſubſtitute *Van Dyck* and Co. as plaintiffs in their room: but if they may be taken to be off the record, then they may be witneſſes, and yet it is not pretended that they could have been examined; the argument therefore, that aſſerts that they may be taken from off the record, not holding good to all purpoſes, fails entirely. I cannot conceive on what ground it can be ſaid that *Bauerman* and Co. may be conſidered not as the parties in the cauſe for the purpoſe of rejecting their admiſſions, and yet as the parties in the cauſe for the purpoſe of preventing their being examined as witneſſes. I take it to be an incontrovertible rule that the admiſſion made by a plaintiff on the record is admiſſible evidence; and on the trial of this cauſe there was proof of an admiſſion by the plaintiffs that they had no ground upon which to ſupport the action. With regard to the caſe of *Biggs* v. *Laurence*, which was cited to ſhew that an acknowledgment made by the defendant's agent was evidence againſt the principal, it is ſufficient to ſay that that was not the point on which the caſe was argued or determined in this court. It is my wiſh and my comfort to ſtand ſuper antiquas vias: I cannot legiſlate, but by my induſtry I can diſcover what our predeceſſors have done, and I will ſervilely tread in their footſteps. I am therefore clearly of opinion on principles of law that the plaintiffs cannot recover in this action, and that we cannot in this caſe aſſume the juriſdiction of a court of equity in order to overrule the rigid rules of law.

Ashhurst J. It was competent to *Van Dyck* and Co. to have made themſelves parties to the record, inſtead of which they have choſen

choſen to ſue in the names of *Bauerman* and Co., by which they have made the latter the real plaintiffs in a court of law, and are bound by their acts and by the acts of other perſons done by the orders of *Bauerman* and Co. Here it is admitted that if the letter in queſtion were to be read as againſt *Bauerman* and Co. conſidering them as the plaintiffs, it afforded ſufficient ground to convince a jury that the plaintiffs ought not to recover: but it is argued that, though the letter be admiſſible in evidence, as it appears by the latter part of it that *Bauerman* and Co. were acting only as agents for *Van Dyck* and Co. the admiſſion made by the former ought not to prejudice the latter. But that argument cannot be ſupported. When *A.* appoints *B.* his agent, he is bound by every act and order of his done within the ſcope of his authority. Here it appears by the letter that *Bauerman* and Co. were preſent when the ſhip was loading and approved of the mode in which it was effected: then if the loſs happened in conſequence of the directions given by *Bauerman* and Co., *Van Dyck* and Co. muſt be bound by it as much as if the orders had been given by themſelves.

GROSE J. *Van Dyck* and Co. might either have ſued in their own names as the conſignees, or in the names of the preſent plaintiffs the conſignors of the goods. They have choſen to bring the action in the names of the latter, whom therefore we muſt conſider as the plaintiffs in the cauſe. As long as *Bauerman* and Co. are plaintiffs on the record, they muſt be taken to be ſo in all the conſequences. Here it appeared by their own acknowledgment that there was no foundation for the action, and that acknowledgment muſt in this action conclude *Van Dyck* and Co.

LAWRENCE J. The ground, on which it muſt be contended that the admiſſion made by a mere truſtee is not evidence, is that he has no intereſt in the ſubject, and may therefore be induced to admit what is not true. But in this caſe *Van Dyck* and Co. are in this difficulty; the preſent plaintiffs either have or have not an intereſt; but it muſt be conſidered that they have an intereſt in order to ſupport the action, and if they have, an admiſſion made by them that they have no cauſe of action is admiſſible evidence. I have looked into the books to ſee if I could find any caſe in which it was holden that the admiſſion of a plaintiff on the record was not evidence, but have found none. There is a caſe in *Salkeld* (*a*), where Lord *Holt* ſaid that if the plaintiff in ejectment,

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(*a*) *Vide* Anonymous, *Salk.* 260.

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who is conſidered only as a truſtee for the leſſor, releaſed the action, he might be committed for a contempt of the court, but he did not ſay that the releaſe would not defeat the action; this therefore appears to be the moſt that a court of law can do in caſes of this kind (*a*).

Rule diſcharged (*b*).

(*a*) See *Payne* v. *Rogers*, *Dougl.* 407. where the tenant, a nominal plaintiff, having given a releaſe to the defendant, the Court ordered it to be given up on an application by the landlord.

(*b*) Craib and Wife *againſt* D'Aeth, Bart. Tr. 30 Geo. 3.

Debt on a bond dated 10th of *June* 1776 from the defendant to *M. Bartlett*, ſpinſter, now the wife of the plaintiff *W. Craib*, in 300 *l.* Plea non eſt factum, and iſſue thereon. Afterwards there was a plea puis darrein continuance of a releaſe of the action dated the 30th of *January* 1788. The replication ſtated the condition of the bond, which was for the quarterly payment of an annuity of 50 *l.*, and that after the making of the bond and the intermarriage of the plaintiffs, but before the releaſe, viz. 30th *October* 1784, by indenture the plaintiffs in conſideration of 300 *l.* aſſigned the annuity and bond to *J. Mawley*, and empowered him to ſue for it in their names, and the plaintiffs covenanted not to receive or releaſe it without *Mawley*'s conſent, or a rule or decree in a court of law or equity; that after the making of the ſaid indenture and before the releaſe viz. 9th *June* 1785 *Mawley* in conſideration of 320 *l.* aſſigned to *Thomas Johnſon*; that the defendant afterwards had notice of the ſaid indentures; that after the making of the ſaid laſt-mentioned indenture and before the releaſe and the plaintiff's original writ viz. *Michaelmas* 1787, 112 *l.* 10 *s.* became in arrear, which the defendant refuſed to pay; whereupon *Johnſon* in the plaintiffs' names ſued him for his (*Johnſon*'s) benefit; that the defendant having notice of the premiſes fraudulently obtained the releaſe, whereby the ſame is void. Rejoinder, that the bond was aſſigned to *Mawley* in truſt for the plaintiffs, and not for his own benefit, and that *Mawley* without the plaintiffs' knowledge fraudulently aſſigned it to *Johnſon*; with a traverſe that the defendant fraudulently obtained the releaſe. The ſurrejoinder took iſſue on the traverſe. And there was a verdict for the defendant on both the iſſues. The defendant at the trial gave in evidence before Lord *Loughborough* at *Guildhall* an affidavit of *W. Craib* the plaintiff on the record, ſworn by him after he had aſſigned the bond, in which were ſtated the facts relied on by the defendant; on which the plaintiffs' counſel tendered a bill of exceptions to the admiſſibility of the evidence, which came on and was to have been argued this day: but *the Court* ſaid it was too clear to be argued; and that there could be no queſtion but that any thing ſaid or ſworn by the plaintiffs on the record muſt be evidence for the defendant.

Saturday, *June* 9th.

Tekell *againſt* Casey.

There need not be any ſtamp on a promiſory note for the weekly payments to a debtor under the Lords' act.

Nolan moved to diſcharge the defendant out of cuſtody, he having complied with the requiſites to entitle him to receive the benefit of the Lords' act, and the plaintiff having given him a note for the weekly payment of 3 *s.* 6 *d.* on a 6 *d.* (*a*) ſtamp only, inſtead of an 8 *d.* (*b*) ſtamp. But

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(*a*) Vid. *Pitman* v. *Hagues*, ſup. 530.

(*b*) By ſtat. 37 *Geo.* 3. *c.* 90. *ſ.* 1. a duty of 2 *d.* in addition to the former duty of 6 *d.* is impoſed on promiſory notes not payable on demand, where the ſum thereby made payable amounts to 40 *s.* &c.

Lord

Lord KENYON Ch. J. ſaid that the Court had had an opportunity of conferring with the other Judges on this ſubject, a ſimilar queſtion having ariſen in the laſt term (*a*), and that they were all of opinion that no ſtamp whatever is neceſſary on notes of this kind.

Rule refuſed.

(*a*) In the caſe of *Lewen* v. *Parrott*.

KAYE one &c *againſt* DENEW.

Saturday, June 9th.

An attorney when in priſon may ſue by attachment of privilege for a debt of his own, notwithſtanding the ſtat. 12 *Geo.* 2. *c.* 13. *ſ.* 9.

THE plaintiff, an attorney of this court, having while he was a priſoner in the Fleet ſued the defendant by attachment of privilege, the defendant obtained a rule calling on the plaintiff to ſhew cauſe why the proceedings ſhould not be ſet aſide for irregularity, on the ſtat. 12 *Geo.* 2. *c.* 13. *ſ.* 9. which enacts "that no attorney who ſhall be a priſoner in any gaol or priſon or within the limits rules or liberties of any gaol or priſon ſhall during his confinement in any gaol or priſon &c in his own name or in the name of any other attorney ſue out any writ or proceſs or commence or proſecute any action or ſuit in any courts of law or equity, and that all proceedings in ſuch actions or ſuits ſhall be void and of none effect." But, after cauſe ſhewn,

The Court were clearly of opinion that the ſtatute did not extend to caſes where the attorney (plaintiff) was ſuing for a debt due to himſelf, but that it was paſſed for the purpoſe of prohibiting an attorney ſuing for other perſons. And they

Diſcharged the rule.

Lawes in ſupport of the rule.

Mingay and *Reader* againſt it.

The KING *againſt* The Inhabitants of DERSINGHAM.

Wedneſday, June 13th.

A right of common in groſs is a tenement within the ſtat. 13 and 14 *Car.* 2 —A perſon renting ſuch a common of the annual value of 10*l.* thereby gains a ſettlement.

THE quarter ſeſſions confirmed an order of two juſtices, by which the pauper *R. Curtis* his wife and five children were removed from *Ingoldeſthorpe* to *Derſingham*, ſubject to the opinion of this Court on the following caſe.

" *Robert Curtis* the pauper in *June* 1795 went to reſide at *Derſingham* in a houſe which with half an acre of land and the going of two head of cattle on *Derſingham* Common he hired of one

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one *Pretty* at the rent of 6*l.* till the *Michaelmas* following. He continued to occupy the ſaid houſe land and common rights till the ſucceeding *Michaelmas* (viz.) *Michaelmas* 1796 at a rent of 8 *l.* a-year. About the time he went to *Derſingham* (viz.) *June* 1795 he hired of one *Smith* the going of three other head of cattle upon the ſame common till the *Candlemas* following at the rent of 1 *l.* 11 *s.* 6 *d.*; and of one *Chadwick* the going of one other head of cattle on the ſaid common for the ſame period at the rent of 10 *s.* 6 *d.* The common rights in queſtion were rights of common in groſs (*a*). The 8 *l.* paid to *Pretty* for the houſe and land &c. with the two guineas paid to *Smith* and *Chadwick* for the common rights, which the pauper enjoyed from *Midſummer* 1795 to *Candlemas* 1796, made his rent that year 10 *l.* 2 *s.*"

Mingay and *Hulton*, in ſupport of the order of ſeſſions, relied on the caſe of *R.* v. *Whixley* (*b*), where it was holden that a cattle-gate was a tenement within the ſtat. 13 and 14 *Car.* 2., to ſhew that a common in groſs is equally a tenement within the meaning of that act of parliament; and conſequently that the pauper in this caſe gained a ſettlement in the pariſh of *Derſingham*, where he occupied a houſe and land which with the rights of common were of the annual value of 10 *l.*

Erſkine and *Topping*, contrà, admitted that if the pauper were to be conſidered as renting the rights of common he had thereby gained a ſettlement in *Derſingham*, but argued that it appeared on the caſe that he had not the right of common itſelf but only a partial licenſe to uſe it in a particular way.

Lord Kenyon Ch. J. When the caſe was firſt ſent here, it did not appear what kind of a common this was: but it is ſtated in the amended caſe that the rights of common were rights of common in groſs; and that puts an end to the queſtion. A common in groſs is a matter of tenure; Lord *Coke* ſays that a præcipe will lie for it. And there is no doubt but that the pauper rented theſe rights of common.

Per Curiam, Order of ſeſſions confirmed.

(*a*) A former caſe had been ſtated; but this Court, conceiving it to be defective in not ſaying what kind of common this was, directed the caſe to be ſent back to the ſeſſions to be reſtated; and the preſent was the amended caſe.

(*b*) *Ante*, 1 vol. 137.

Ex parte William Gallile otherwiſe Gallery.

Wedneſday, June 13th.

The ſtat. 6 & 7 *W.* 3. *c.* 18 *ſ.* 19., allowing the maſter of a collier to nominate two ſeamen free from being impreſſed, is no longer in force.

Hovell on a former day obtained a rule calling upon the commander of his Majeſty's ſhip *Zealand* to ſhew cauſe why a writ of habeas corpus ſhould not iſſue, directing him to bring up the body of *W. Gallile*, an impreſſed ſeaman.

This was obtained upon the affidavit of the maſter of a collier of 331 tons burthen belonging to *North Shields*, ſtating that he had two months before appointed *Gallile* to be carpenter on board the veſſel, in which capacity he had continued there till he was impreſſed in the river *Thames* where the veſſel then was; that *Gallile* and one *T. B.* chief mate were the only two perſons duly nominated by him (the maſter) for protections from the impreſs by virtue of the 6 and 7 *W.* 3. *c.* 18. *ſ.* 19.; and that *Gallile* had not entered into his Majeſty's ſervice, or received any bounty money.

The caſe Ex parte *Drydon* (*a*) was at the ſame time referred to as deciding that the ſtatute of *William* was ſtill in force. And it was obſerved that the act lately paſſed in the preſent ſeſſion of parliament for ſuſpending protections under former acts of parliament does not enumerate the act of the 6 and 7 *W.* 3. but only ſuſpends the exemptions granted by the 2 and 3 *Ann. c.* 6. *ſ.* 20. and all ſubſequent acts of the like nature.

Perceval now ſhewed cauſe; contending 1ſt, That the act of the 6 and 7 *W.* 3. *c.* 18. *ſ.* 19. was not now in force; and that the caſe Ex parte *Drydon* proceeded upon a miſtake. 2dly, That if that ſtatute were in force, yet this caſe was not brought within it. Upon the firſt point he chiefly relied upon the ſame argument, as had been urged on the part of the Crown in *Drydon*'s caſe, namely, that the exemption granted by that act was temporary and is now expired; and that reference was thereby made to a certificate required by a former act the 5 *W.* and *M. c.* 20. as the criterion by which the number of perſons to be exempted was to be aſcertained, which laſt-mentioned act being expired the certificate could not now be obtained, and conſequently the exemption which was to depend upon the production of the certificate muſt be at an end alſo. As to the two acts referred to by Lord *Kenyon* in giving his judgment in *Drydon*'s caſe, as indicating

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(*a*) *Ante*, 5 vol. 417.

dicating the opinion of the legiſlature that the 6 and 7 *W.* 3. *c.* 18. *ſ.* 19. was ſtill in force, the firſt of thoſe the 11 and 12 *W.* 3. *c.* 13. *ſ.* 8. did indeed refer to the 6 and 7 *W.* 3. as an act in part exiſting; but that may be ſatisfied by the 28th ſection of that act, which introduced ſome regulations concerning ſilks hackney-coaches and other matters, at that time in force. And as to the other ſtatute, the 2 and 3 *Ann. c.* 6., there is ſome ambiguity in the expreſſion, which does not neceſſarily lead to the concluſion that the legiſlature conſidered the 6 and 7 *W.* 3. as a ſubſiſting act, in allowing one able ſeaman in the coal trade for every 100 tons burthen of the veſſel to be protected from the impreſs "*beſides* the maſter, maſter's mate, and carpenter;" for thoſe words as well imply a ſubſtantive and original exemption of thoſe men as a reference to a prior exemption exiſting. Beſides, it is remarkable that three particular perſons are named as exempted in the ſtatute of *Anne*, whereas by the 6 and 7 *W.* 3. only two were ſo ſpecifically exempted. And further, the 6 and 7 *W.* 3. annexes the penalty of 10 *l.* and incapacity to ſerve his Majeſty on board any ſhip of war on any officer impreſſing the two perſons protected by that act; whereas the ſtatute of *Anne* only inflicts the penalty of 10 *l.* on ſuch offender, without the addition of incapacity; a difference which cannot be accounted for otherwiſe than by the Legiſlature having conſidered the former act as expired; for otherwiſe they would not have ſuffered that part of the puniſhment to continue. In addition to this the 19 *Geo.* 3. *c.* 75., which was not cited on the former occaſion, and is nearly verbatim the ſame as the act of the preſent ſeſſions, takes no notice of the 6 and 7 *W.* 3. *c.* 18. as a ſubſiſting law any more than the preſent. 2dly, The party applying has not obtained ſuch a certificate of his nomination as is required by the 6 and 7 *W.* 3. ſuppoſing it to be a ſubſiſting law.

Hovell in ſupport of the application, on the firſt point, relied principally on the caſe Ex parte *Drydon* as being in point. And he obſerved as to the act of the 5 *W.* and *M.* being expired, by virtue of which the certificate required by the 6 and 7 *W.* 3. could no longer be obtained, it was no reaſon why the ſtatute referring to it ſhould be conſidered as expired; for the certificate was merely for the purpoſe of aſcertaining that the duty had been paid, and when that ceaſed there was no longer any occaſion for it. If the Legiſlature had intended to confine the exemption to the duration of the then war, it would have been ſo expreſſed as in other parts of the act; and the difference of the wording ſhewed the difference of the intent: but it was reaſonable to continue the exemption afterwards becauſe the burthen ſtill continued. 2dly, The act of the 6 and 7 *W.* 3. does not point out any particular mode of nomination by the maſter: it is therefore enough that the affidavit ſtates that the maſter had *duly* nominated this perſon to be protected from the impreſs.

Lord KENYON Ch. J. The great queſtion is whether or not the ſtat. 6 and 7 *W.* 3. *c.* 18. *ſ.* 19. were or were not a temporary law. "For the encouraging of all ſuch ſhips or veſſels as ſhould be employed in bringing coals at more reaſonable rates than during the war they had been, it was thereby enacted that there ſhould be allowed yearly free from impreſſing to every maſter of any ſhip or veſſel employed in the coal trade two able ſeamen, ſuch as the maſter ſhould nominate, for every ſhip or veſſel under 100 tons, and one for every 50 tons for every ſhip or veſſel of 100 tons and upwards burthen, *according to the meaſurement which ſuch a ſhip or veſſel ſhould appear to be of by a certificate which ſhould be produced from the Cuſtom-houſe* of what number of tons ſuch a ſhip or veſſel had paid for by an act for laying a duty on tonnage of ſhipping &c." Such a certificate therefore is neceſſary in order to aſcertain the number of men that the maſter is entitled to nominate. But the act of parliament laying the tonnage, according to the meaſurement of which the certificate is to be obtained, was only to continue in force for four years; and though it was afterwards renewed, it is now certainly expired. Then there is no act of parliament now ſubſiſting to enable the party to procure the certificate required by the ſtat. 6 and 7 *W.* 3.; and conſequently the nineteenth ſection of that act was temporary, as indeed were the other adjoining clauſes in that act. If the law regulating the protections is to be governed by another law which was only temporary and no longer exiſts, it muſt alſo be a temporary law itſelf. It is alſo to be obſerved that conſiderable penalties attach on thoſe who preſs men in violation of the certificate; and yet there is no means of obtaining the certificate. This therefore is a difficulty that I cannot get over.

ASHHURST J. of the ſame opinion.

GROSE J. When the ſtat. 6 and 7 *W.* 3. was paſſed, there was a ſpecific mode of nominating thoſe ſeamen who ſhould be protected from being impreſſed: but it is not pretended that that mode has been adopted in this caſe. Then the conſequence is, either that that law has not been complied with in this inſtance, or that the law is expired there being no mode by which the number of men to be protected can be aſcertained. And in either caſe the party applying is not entitled to be diſcharged. But it ſeems to me that, as the maſter cannot now grant his protection in the way required by the ſtatute, the ſtat. of *William* was only a temporary act.

LAWRENCE J. The reaſon of requiring the certificate was to regulate the number of men to whom the maſter was to grant his protection; for unleſs ſome regulation of that kind were made, he might have nominated as many ſeamen as he pleaſed. But as the certificate can no longer be obtained, neither can the protection which depends upon it.

Rule diſcharged (*a*).

(*a*) There was a ſimilar motion on behalf of one *Dobſon*; and in that caſe alſo the rule was diſcharged.

Friday, June 15th.

GERRARD *againſt* CLIFTON; in Error.

The leſſee of a coal-mine covenanted to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhould ſell for at the pit's mouth*: held that he was not liable to pay any part of the money produced by the ſale of the coals elſewhere.

THIS was an action of covenant brought in the court of Common Pleas. The declaration ſtated that by an indenture, dated 30th *September* 1781, by which *T. Clifton*, under whom the plaintiff below claims, demiſed to *Gerrard* and *E. Walmeſly* certain quarries of cannel under certain cloſes of land, with liberty to enter the ſaid cloſes to ſink pits and to bore dig take and carry away all or any part of the cannel that might be found or got underneath, and to do any other act for the better getting raiſing and vending the ſaid cannel, and to uſe or make ſuch ways or roads as they ſhould think proper and convenient for the carting and leading of ſuch cannel into any common highway &c. for the better diſpoſing and vending of the ſame, and alſo liberty to lay place and ſet up the ſaid cannel ſo to be gotten upon any part of the ſame premiſes and there to ſell and diſpoſe of the ſame, habendum for 21 years, at and under the yearly rent of 150 *l.*, and alſo the further ſum of 1 *s.* 9 *d.* for every ſcore baſkets of cannel over and above 41150 baſkets, each baſket not exceeding 132 lb. weight, "and alſo one-half part or ſhare of all ſuch ſums of money as all or any part of the cannel to be gotten by virtue of the ſaid inden-

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ture *ſhould ſell for at the pit mouth* over and above 4 *d.* the baſket; and alſo the further ſum of 4 *l.* per acre for land uſed for roads" &c.; payable half-yearly. Then followed a proviſo that if the leſſees ſhould not get the quantity of 41150 baſkets in any one year of the term and ſhould pay the yearly and other rents therein reſerved, it ſhould be lawful for the leſſees in any ſubſequent year of the term to get and raiſe an additional quantity of cannel over and above the annual quantity of 41150 to make good ſuch deficiency without paying any rent for the ſame, "except the additional rent that might become due and payable for ſuch part of the cannel *as ſhould or might be ſold at the pit's mouth* over and above 4 *d.* the baſket." The leaſe then contained covenants on the part of the leſſees (inter alia) for payment of the rents; that they would from time to time give and deliver to the leſſor, when required, "a full juſt true and particular account of all the cannel which ſhould be raiſed and gotten by virtue of the liberties and privileges thereby granted, and of the price and prices at which the ſame and every part *ſhould be ſold at the pit or pits* out of which the ſame ſhould be gotten and raiſed;" and that it ſhould be lawful for the leſſor or his agent "to ſee and take an account of the quantities of cannel from time to time got at the ſaid cannel works or any of them, and of the price and prices at which the ſame and every part thereof *ſhould be ſold at the pit*," and to take copies of books &c. The breach aſſigned was that the leſſees had between the 1ſt of *January* 1792 and the 29th of *September* 1794 gotten raiſed and drawn out at the pit mouth upon the ſaid premiſes 100,000 baſkets of cannel and ſold the ſame at other places than at the pit mouth for divers ſums of money, and which might and would have ſold at the pit mouth for more than 4 *d.* the baſket, to wit, for 1 *s.* the baſket, one-half part or ſhare of which ſaid ſeveral ſums of money that the ſaid cannel might and would have ſold for at the pit mouth over and above 4 *d.* the baſket amounted to 1333 *l.* 6 *s.* 8 *d.*, but that the leſſees had not paid the ſaid ſum &c.

To this declaration there was a general demurrer. Before judgment was given in the Common Pleas, one of the defendants (*Walmeſly*) died; her death was ſuggeſted on the record; and then judgment was given for the plaintiff (*a*), to reverſe which judgment a writ of error was brought.

(*a*) But there was a difference of opinion on the Bench in that Court.

This

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This caſe was argued in the laſt term by *Lambe* for the plaintiff in error and *Yates* for the defendant, and again this day by *Heywood* Serjeant for the former and *Adair* Serjeant for the latter.

The only queſtion was whether it was the intention of the parties to this leaſe that the leſſees ſhould only pay the additional rent of one-half part of ſuch ſums above 4 *d.* the baſket as the cannel *gotten and ſold at the pit mouth*, or as all the cannel *raiſed there but carried and ſold elſewhere*, ſhould ſell for. A caſe aroſe on this leaſe in *E.* 34 *Geo.* 3. (*Ante*, 5 vol. 564.) where the ſame queſtion was agitated, except that in that caſe the leſſees pleaded that they had not broken the covenant, and on the trial one queſtion was whether or not the evidence ſupported the plaintiff's declaration. A ſpecial caſe was reſerved, and after argument this Court gave judgment for the defendant, thinking that the leſſees were only liable for the additional rent reſpecting the coal gotten and ſold at the pit mouth.

Lord KENYON Ch. J. The reſpect which I owe to the opinions given in the court of Common Pleas in this caſe leads me to ſuppoſe that there are ſome difficulties in it, which have eluded my ſearch though I have read it over and over again. In the courſe of the argument ſome caſes have been alluded to: but decided caſes are never brought forward with effect unleſs they eſtabliſh certain principles. Thoſe caſes were cited to eſtabliſh a point that wants no authority to ſupport it, namely, that when a court of law is called upon to conſtrue the agreement of the parties, it is their duty to diſcover the intention of the parties and to give effect to it if by law they can. [His Lordſhip here ſtated the material parts of the leaſe; and proceeded thus.] It is not pretended that the leſſee has not paid the half part of the money that the coals ſold for at the pit's mouth; but the breach aſſigned is the non-payment by the leſſee of the half part of the money produced by the ſale of coals elſewhere but which might have been ſold at the pit's mouth; and the queſtion is whether under this reddendum the leſſee is liable for coals not ſold at the pit's mouth. When this queſtion came before us on a former occaſion, it appeared to me that, as the leſſee had ſtipulated to pay for the coals ſold at the pit's mouth in contradiſtinction to thoſe not ſold there, he was not to pay for the latter: I ſtill continue of the ſame opinion. If I were to indulge in conjecture and ſpeculation as to any ſuppoſed intention of the parties not expreſſed in the deed, I ſhould have as little doubt; but I diſclaim proceeding on any ſuch ground. It is ſufficient

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ficient for me to ſay that the leſſee has not entered into the covenant inſiſted upon by the plaintiff below: the parties have met here on the conſtruction of a ſolemn inſtrument in which their reſpective rights and duties are clearly preſcribed, and we cannot ſubſtitute any other contract in lieu of that into which they have entered. Therefore I am clearly of opinion that the judgment below ought to be reverſed.

ASHHURST J. There is no doubt about the words of this leaſe; and it is better to adhere to the words of the covenant than to indulge ourſelves in conjectures as to the ſuppoſed intention of the parties. There ſeems alſo good reaſon for framing this contract; if the leſſee were only to pay for the coals ſold at the pit's mouth, there was no riſk on his part, and the produce was a matter of ſimple calculation: but if he were to pay for thoſe ſold at a diſtance, independently of it's being a hazardous adventure on the part of the leſſee, the net profits of the ſale would be uncertain, on account of the great expences attending ſuch a ſale and the uncertainty of the market. Therefore as the words of the covenant are plain, and as there is no reaſon for departing from them in conſtruing this leaſe, I think the plaintiff in error is entitled to our judgment.

GROSE J. The plaintiff below does not contend that he is entitled to one-half of the money that the coals were worth when drawn out of the pit's mouth; but he inſiſts that whether they be ſold there or elſewhere he is entitled to half of the money for which they might have ſold at the pit's mouth: but the words of the covenant are plain and unambiguous, and do not afford that conſtruction. This is a leaſe of certain quarries, giving liberty to the leſſee to ſink pits and to dig for and carry away all or any part of the coals found therein, and alſo to make roads for the better diſpoſing of the ſame; giving liberty alſo to place the coals on the demiſed premiſes and there to diſpoſe of the ſame; evidently pointing out two modes of ſale, one on the ſpot, the other at a diſtance by means of the new roads. And then follows the reddendum, by the latter part of which the leſſee is liable to pay "one half of all ſuch ſums of money as all or any part of the cannel to be gotten *ſhould ſell for at the pit's mouth*." The leſſee alſo covenanted to deliver in from time to time an account of all the cannel raiſed, and of *the price and prices at which the ſame ſhould be ſold at the pit or pits*, but not of the price of the coals

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ſold elſewhere. Then what was the meaning of the parties in making this leaſe? they clearly had in their contemplation two modes of ſale, one at a diſtance which would be attended with conſiderable expence and hazard, the other at the pit's mouth, and the latter part of the reddendum only applies to this ſecond mode. If the parties had intended that it ſhould apply to the other mode, one of the other covenants on the part of the leſſee would have been that he ſhould give an account of *all coals* ſold, without confining it to the account of the coals ſold at the pit's mouth. It ſeems to me that thoſe words in that covenant were inſerted to point out the diſtinction between the coals ſold at the pit's mouth and thoſe ſold elſewhere. The words of this deed throughout are clear and poſitive; but the plaintiff below wiſhes us to alter them on account of a ſuppoſed intention of the parties to the contrary, which does not appear. However I am ſatisfied from the words of this reddendum that the plaintiff below is not entitled to recover, and this conſtruction is ſupported by every part of the deed.

Lawrence J. The argument of the plaintiff below is that the covenant to pay one-half part of the money produced by the ſale of the coals at the pit's mouth is to be conſtrued as if it were to pay for the coals *at and after the rate* for which they might have been ſold at the pit's mouth; and the ground of that argument is borrowed from other covenants, particularly that reſpecting the deficiency, where the words are "except the additional rent that might become due and payable for ſuch part of the cannel as ſhould or *might* be ſold at the pit's mouth &c." That argument proceeds on a ſuppoſition that the word "might" as there introduced is only capable of one interpretation: but the anſwer given to it in the argument was the true one; it means not only the power of ſelling but alſo the price for which the coals might happen to be ſold there. Without examining every particular part of this deed, it ſeems to me that the intention of the parties, as it is to be collected from the whole inſtrument, is againſt the conſtruction contended for by the plaintiff below.

Judgment reverſed.

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GEYER *againſt* AGUILAR.

Friday, June 15th.

By the ſentence of a French court of Admiralty it appeared that the ſhip inſured *warranted American* had been condemned as enemy's property for want of having on board a roled'equipage or liſt of the crew, ſuch as is required by a marine ordinance of France, and adjudged by the court there to be requiſite within the meaning of the treaty of commerce between France and America; held to be concluſive evidence againſt the warranty of neutrality, though in fact the ſhip was American.

This action was brought to recover a total loſs by capture upon a policy of inſurance underwritten by the defendant on the freight of the *American* ſhip *Rainbow*, *William Smith* maſter, at and from *Charleſtown* to *London*, "*warranted* American *property*," and valued at 800 *l*. The premium having been returned and accepted without prejudice, the defendant pleaded the general iſſue; and on the trial at the Guildhall Sittings after *Hilary* Term 1798 the following caſe in ſubſtance was reſerved for the opinion of this Court. The plaintiff reſides at *Charleſtown* in *North America*, and was the ſole owner of the ſhip *Rainbow* which took in a cargo at *Charleſtown* upon freight for the voyage deſcribed in the policy. The ſhip ſailed upon the voyage inſured under the command of Captain *W. Smith*, a native of the iſland of *Bermuda*, who was naturaliſed in the United States of *North America* on the 18th *January* 1796; and on the 25th of *March* 1797 ſhe was captured by a *French* privateer and carried into *Nantz* in *France*, where ſhe was condemned and ſold for the benefit of the captors. The *Rainbow* at the time of her firſt ſailing and till her capture had on board a proper regiſter as an *American*-built veſſel, a paſſport or ſea-brief duly certified, and the ſeveral other documents referred to in the ſentences of condemnation; but ſhe had no certified roll d'equipage or liſt of her crew. The plaintiff offered to prove that he was born within the United States of *North America*, and had been domiciled there from his birth, and that the ſhip and freight were his ſole property: but on the other hand there was produced a record of condemnation by the Commercial Tribunal of *Nantz* having competent juriſdiction dated 12th *May* 1797, which ſtated the queſtions of fact made to be, 1ſt, Whether the ſhip *Rainbow* and her cargo were neutral property? 2d, Whether the papers and other things found on board the *Rainbow* ſufficiently proved the property? and the queſtions of right to be, 1ſt, Whether a neutral *American* ſhip fitted out with papers vouching its neutrality were a lawful prize for having on board bills of lading of her cargo which are not ſigned? 2dly, Whether theſe bills of lading not poſitively pointing out that the merchandiſe which they contained were neutral property could give cauſe for confiſcation? 3dly, Whether a neutral *American* ſhip was to be declared a lawful prize

becauſe

becauſe ſhe had not on board a liſt of the crew, or becauſe that which ſhe produced was not ſigned by a public officer? &c. It then ſtated that the privateer having chaſed the *Rainbow* which carried *American* colours brought her to, and on examination of her papers the *French* captain obſerved there was no liſt of the crew, that the manifeſt of the cargo was contrary to the declaration made to him by the *American* officer, and that the bills of lading produced were not ſigned; for which reaſon he thought the *American* ſhip a lawful prize, eſpecially as her deſtination was for *London* an enemy's country. He therefore brought her into *Nantz*. That Captain *Smith* offered to prove, 1ſt, That the ſhip *Rainbow* was *American* built and *American* property, conſequently neutral; 2dly, That the goods on board her belonged to and were going on account and riſk of ſubjects of the United States of *America*, and conſequently were neutral property alſo. To prove the firſt point it was argued that the 25th article of the treaty between *France* and *America* made 6th *February* 1778 required that when either of the powers ſhould be engaged in war the ſhips of the other ſhould be provided with a ſea-letter or paſſport, expreſſing the property and deſtination of the ſhip, with the name and abode of her maſter, and that Captain *Smith* had conformed to this law. Firſt he carried a regiſter dated 6th *October* 1795 delivered at *Charleſtown* by the proper officers which proves the ſhip *Rainbow American* built and owned by *John Geyer* an *American* citizen; on which regiſter there was an indorſement that Captain *Smith* after taking the uſual oath had taken the command of the ſhip. Then he produced a paſſport or ſea-letter in due form from the *American* government dated 14th of *February* 1797 for the voyage inſured. 2dly, To prove the cargo *American* and neutral, five bills of lading were produced expreſſing the real names of the parties &c. And annexed to the ſhip's manifeſt is a judicial act, proving authentically that the ſhippers of the goods therein ſpecified which correſpond with the bills of lading had appeared before a juſtice and notary of *Charleſtown* and ſworn before him that the goods they had laden in this ſhip were their property, and that no ſubjects of the powers then at war had either directly or indirectly any intereſt therein; which paper was duly legaliſed by Citizen *Dupont* the *French* conſul, and dated at *Charleſtown* 2d *Ventoſe* in the 5th year of the Republic. On the part of the captors it was replied that the 25th article of the treaty of *February* 1778, required *American* ſhips to have on board a liſt ſigned containing the names, ſurnames, places of birth and abode of the perſons compoſing their crews or embarking on board them, and that in every port the captain ſhould ſhew it to the cuſtom-houſe officers and juſtices; that Captain *Smith* had not on board ſuch a liſt; conſequently it was in contravention of the law, and as ſuch ſubject to confiſcation. That this law is confirmed by the 9th article of the regulation of 26th *July* 1778 which declares all foreign ſhips to be good prize that have not on board a liſt of the crew ſigned by the public officers of the neutral place they depart from; and ſtill further confirmed by the 4th article of the decree of the Executive Directory of 12th *Ventoſe* laſt, which ſays that conformably to the law of 14th *February* 1793 the regulations of 21ſt *October* 1744 and 26th *July* 1778, concerning the manner of proving the property of neutral ſhips and goods, ſhall be executed according to their meaning and tenor; conſequently all *American* ſhips that have on board a liſt of the crew in due form as preſcribed by the model annexed to the treaty of the 6th of *February* 1778 ſhall be good prize, and the execution of which is ordered by the 25th and 27th articles of the ſame treaty. That alſo by the 9th article of the regulation of 1778, in order for any veſſel to be conſidered neutral, ſhe ſhould not have on board a commanding officer of an enemy's country, and Captain *Smith* is an *Engliſhman* born; and that the letter of naturalization in the *American* States delivered to him at *Charleſtown* on the 18th of *January* 1796 was inſufficient becauſe annulled by the regulations of the 23d of *July* 1794 and the 21ſt of *October* 1744, expreſsly requiring that the letters of naturalization ſhould have been obtained before the declaration of war, and that thoſe to whom they are granted ſhould have been domiciled in the neutral ſtates before that period and ſhould not have returned to their native countries ſince the letters were obtained. But Captain *Smith* did not obtain his letters of naturalization till after the declaration of war between the *French* Republic and *England*, no mention is made what time he had lived in the United States, and it appeared he had returned to *England* ſince he obtained his naturalization. In reply it was obſerved, 1ſt, that it was not cuſtomary in the United States for maſters of ſhips to have liſts of their crews, and that there was no public officer appointed to deliver them. That the only paper of the kind made uſe of was one produced of an agreement between the maſter and the crew;

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and that it muſt have been by miſtake that the decree of the Executive Directory of 12th *Ventoſe* laſt ſeemed to require of *American* ſhips a liſt of their crew in any different form, ſince the 25th and 27th articles of that treaty, the execution of which is preſcribed, do not ſpeak of it. Moreover this decree being of a date poſterior to the departure of the *Rainbow* from *Charleſtown* could not have any retroſpective effect, and conſequently could not be obligatory upon Captain *Smith*. That as to the act of naturalization it was in the form cuſtomary in *America*, that Captain *Smith* having fulfilled all the formalities preſcribed by the laws of the country and taken the requiſite oath was declared and inrolled a citizen of the United States. Then the tribunal paſſed ſentence in the following terms; "Conſidering that the 7th article of the law of 13th *Nivoſe* in the 3d year, which abrogated that of the 9th of *May* 1793, cannot be applied to Captain *Smith* according to the decree of the Executive Directory of 12th *Ventoſe*, and that this law remains in force; conſidering that ſuch decree of 12th *Ventoſe* declares lawful prize all *American* ſhips not having a liſt of their crews conformable to what is preſcribed by the model annexed to the treaty of *February* 1778; that the ſame decree orders agreeably to the law of the 9th of *May* 1793 the execution of the regulations for neutrals in time of war of the 21ſt of *October* 1744 and the 22d of *July* 1778, fixing the manner of eſtabliſhing at ſea the property of neutral ſhips and goods; conſidering that there was not on board the ſhip *Rainbow* ſuch a liſt of the crew as is preſcribed by the model annexed to the ſaid treaty; that the captain of the *Rainbow* has only produced conformable to the 27th article of ſuch treaty his paſſport or ſea-letter and the act of the *American* congreſs of the 26th of *July* 1790, on the back of which is an agreement printed in *Engliſh* and ſubſcribed by only ſeven of his crew, and that it was not till after the examinations that there were twelve names upon it, being the crew on board; conſidering that the captain produced only bills of lading without ſignature, which as ſuch are null; that the only authentic paper he produced is a manifeſt of his cargo with a declaration of the ſhippers that it is their ſole property, which declaration has been received by a juſtice and notary of *Charleſtown* and the ſignature of which has been legalized by the conſul of the *French* Republic reſident there; conſidering that the decree of the Directory of 12th *Ventoſe* laſt peremptorily declares *American* ſhips which ſhall not have on board liſts of their crews lawful prizes, and declares them at the

the ſame time enemies; conſidering laſtly that a ſhip declared an enemy and to be a good prize includes the confiſcation of her cargo; the tribunal in conformity to the decree of the Executive Directory before quoted adjudges and declares the validity of the prize of the *American* ſhip *Rainbow* Captain *William Smith*; adjudges likewiſe the validity of the capture and confiſcation of all the cargo &c; *the whole being, for want of Captain* Smith*'s having the papers in due form, thought to belong to enemies of the Republic*," &c.

The caſe then ſet forth another ſentence upon appeal, confirming the above, in which appeared the following paſſages; "Conſidering that for upwards of an age the *French* legiſlation reſpecting neutral ſhips of nations the moſt favored has been founded upon poſitive regulations, the wiſdom of which has been univerſally allowed, and this legiſlation confirmed by the ſubſequent regulation of *July* 1778, that the obligation upon neutrals to be provided with a role d' equipage was not burthenſome to them, and that the expreſs diſpenſation of this formality had procured to them no other advantage than the facility of favoring the powers at war; that it is therefore inconſiſtent to ſuppoſe the *French* at the very inſtant of their oppoſing to the moſt favored nations the ſtricteſt precautions ſhould have exempted the *Americans* from the moſt eſſential of thoſe precautions, or ſhould at all have relinquiſhed the power of examining whether their ancient enemies abuſed the flag of their new allies; conſidering alſo that ſo far from the treaty of 1778 announcing ſuch an intention, the 12th 25th and 27th articles unequivocally expreſs a deſire of preventing all abuſe of the flag, from whence it follows as a conſequence that to attain the ſame end it muſt be preſumed the *French* meant to employ the ſame means, viz. the obſervance of their regulations; conſidering that it is contradictory to ſay that parties who lay themſelves under an obligation to deliver a liſt ſigned purſuant to the form of the paſſport, which makes an integral part of that treaty, are exempted from producing a proof of this liſt having been delivered becauſe an obligation the performance of which we are not bound to prove cannot in civil or public right be an obligation; that on the contrary it may eaſily be perceived that the compilers of the treaty adopting the *French* regulation reſpecting the liſt or muſter-roll did not think it neceſſary to repeat minute details in every article, and that if in the 27th article they have mentioned only a paſſport it was becauſe they conſidered it as the ſame thing with the liſt it preſcribes, and which might as well be indorſed upon the paſſport as the regiſter; conſidering that this interpretation is confirmed by the very form of the paſſes from the *American* government, becauſe their paſſports printed in three columns in *French*, *Engliſh*, and *Dutch*, contain in the two laſt of thoſe languages only the firſt part of the form annexed to the treaty of 1778, as far as the clauſe concerning the act of property incluſively, and the *French* verſion contains in addition theſe eſſential terms, "as alſo that he ſhall keep and cauſe to be kept by his crew the maritime ordinances and regulations, and ſhall enter a liſt," &c; conſidering that the muſter-roll found on board the *Rainbow* has no ſignature, is informal, and incomplete, whether conſidered as containing either ſix names or nine; conſidering that independently of the regulations of 1704, 1744, and 1778, requiring under pain of confiſcation the production of the roll, the interpretation of the treaty of 1778 moſt favorable for the *American* flag is to ſay, that the production of the paſſport ſuppoſes the delivery in *America* of the muſter-roll it preſcribes, but that this preſumption muſt neceſſarily give way to proof of the contrary, and that Captain *Smith* does not allege a depoſit at *Charleſtown* of ſuch a liſt as is required, but admitted on the contrary that he did not know what nation his crew were of, that he had never aſked for their paſſports, and knew of having on board only three novices *Americans*, one *Ruſſian* ſeaman, and one *Swede*, the two latter of whom he had hired at *London* on his laſt voyage &c." The ſentence then, after ſtating ſome trifling variations in the examination of the captain and that of the crew, proceeds thus; "Conſidering that theſe multiplied contradictions leave no room for doubting the falſity of the diſpatches, if one moreover adverts to the facility the *Engliſh* ſeem to have in procuring them, inaſmuch as Captain *S. Heath* of the *Engliſh* ſhip *Friendſhip* captured by the ſame privateer depoſed on the 9th inſtant before a juſtice for this town that he had purchaſed falſe *American* diſpatches at *Guernſey* for two guineas, which (with the difference of names) are ſimilar to Captain *Smith*'s; conſidering that he himſelf is an actual born *Engliſhman* and only a naturalized *American* by act of the 18th of *January* 1786, ſubſequent to the declaration of war between *France* and *England*, which alone by our laws and the 8th article of the regulation of 1744 is ſufficient to validate the capture; conſidering that Captain *Smith* acknowledged he had ſince obtaining ſuch letters of naturalization made a

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voyage to *London*, commanding the ſhip *Ruby*, had been captured on his return by the *French* privateer *La Lutine*, had afterwards retaken his ſhip and expoſed the *French* captors to the mercy of the ſeas in a mere boat at a diſtance from the land, which more and more characterizes an enemy of the *French* nation; the tribunal of the department declare it has been well adjudged by the ſentence of the tribunal of commerce that the appellant is not aggrieved" &c; and condemned him in coſts.

The caſe alſo ſet forth the 12th article of a certain ordinance made in *France* on the 21ſt of *October* 1744, viz. all foreign ſhips ſhall be good prize on board which ſhall be a ſupercargo dealer clerk or ſea officer of a country enemy to his majeſty, or whoſe crew ſhall be compoſed of more than one third of the marines ſubjects of ſtates his majeſty's enemies, or which ſhall not have on board the muſter-roll of the crew ſtated by the public officers of the neutral places from which the ſhips ſhall have departed. The treaty referred to between the late King of *France* and the United States of *America* on the 8th of *February* 1778 contained (inter alia) the following articles and form of paſſport; Article 12. "The merchant ſhips of either of the parties, which ſhall be making into a port belonging to the enemy of the other ally, and concerning whoſe voyage and ſpecies of goods on board her there ſhould be juſt grounds of ſuſpicion, ſhall be obliged to exhibit as well upon the high ſeas as in the ports and havens not only her paſſports but likewiſe certificates expreſsly ſhewing that her goods are not of the number of thoſe which have been prohibited as contraband." Article 25. "To the end that all manner of diſſenſions may be avoided on the one ſide and the other, it is agreed that in caſe either of the parties hereto ſhould be engaged in war the veſſels belonging to the ſubjects or people of the other ally muſt be furniſhed with ſea letters or paſſports expreſſing the name property and bulk as alſo the name and place of habitation of the maſter and commander of the ſaid ſhip; that it may appear thereby that the ſhip really and truly belongs to the ſubjects of one of the parties, which paſſport ſhall be made out and granted, according to the form annexed to this treaty. They ſhall likewiſe be recalled every year, that is, if the ſhip happen to return home within the ſpace of a year. It is likewiſe agreed that ſuch ſhips being laden are to be provided not only with paſſports as above mentioned, but alſo with certificates containing the ſeveral particulars of the cargo, the place whence the ſhip ſailed, and whither ſhe is bound, that ſo it may be

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be known whether any forbidden or contraband goods be on board the ſame, which certificate ſhall be made out by the officers of the place when the ſhip ſets ſail in the accuſtomed form." Article 27. "If the ſhips of the ſaid ſubjects of either of the parties ſhall be met with either ſailing along the coaſt or on the high ſeas by any ſhip of war of the other or by any privateers, the ſaid ſhip of war or privateers for the avoiding of any diſorder ſhall remain out of cannon-ſhot and may ſend their boats on board the merchants ſhip which they ſhall ſo meet with, and may enter her to the number of two or three men only, to whom the maſter or commander of ſuch veſſel ſhall exhibit his paſſport concerning the property of the ſhip made out according to the form inſerted in this preſent treaty; and the ſhip when ſhe ſhall have ſhewed ſuch paſſport ſhall be free and at liberty to purſue her voyage, ſo as it ſhall not be lawful to moleſt or ſearch in any manner, or to give chaſe or to force her to quit her intended courſe." Form of the paſſport; "To all &c. It is hereby made known that leave and permiſſion has been given to maſter or commander of the ſhip called of the town of burthen tons or thereabouts, lying at preſent in the port and haven of bound for laden at after that his ſhip has been viſited, and before ſailing he ſhall make oath before the officers who have the juriſdiction of maritime affairs that the ſaid ſhip belongs to one or more of the ſubjects of , the act whereof ſhall be put at the end of theſe preſents; as likewiſe that he will keep and cauſe to be kept by his crew on board the marine ordinances and regulations and enter (remettra) a liſt ſigned and witneſſed, containing the names and ſurnames the places of birth and abode of the perſons compoſing the crew of his ſhip and of all thoſe who ſhall embark on board her, whom he ſhall not take on board without the knowledge and permiſſion of the officers of the marine. And in every port or haven where he ſhall enter with his ſhip he ſhall ſhew his preſent leave to the officers and judges of the marine, and ſhall give a faithful account to them of what paſſed and was done during his voyage; and he ſhall carry the colours &c."

It alſo appeared in evidence in this cauſe that other ordinances purporting to be for regulating the navigation of neutral ſhips in time of war had been made and publiſhed in *France* on the 26th of *July* 1778 by the then exiſting government of that kingdom, the 9th clauſe of which being alſo the ſame referred to by the ſaid ſentences as of that date is in the following terms;

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9. "Foreign ſhips ſhall be good prize on board which there ſhall be a ſupercargo, dealer, clerk, or principal officer of a country enemy to his Majeſty, or whoſe crew ſhall be compoſed of more than one third of the mariners ſubjects of ſtates his majeſty's enemies, or which ſhall not have on board the muſter-roll of the crew ſtated by the public officers of the neutral place from which the ſhip ſhall have departed." It was further proved that the following decrees had been made and publiſhed by the authority of the government now ſubſiſting in *France* at the time they reſpectively bear date, and that they are the ſame as are alluded to by the ſame ſentences as paſſed on thoſe ſeveral dates. "14th *February* 1793, the ſecond year of the *French* Republic. The old laws concerning prizes ſhall continue to be executed until it is otherwiſe ordered." "4th *Germinal* in the 2d year of the *French* Republic, being 3d *April* 1794. The treaties of navigation and commerce ſubſiſting between *France* and the nations with which ſhe is at peace ſhall be executed according to their form and tenor." "13th *Nivoſe* 3d year *F.* R., being the 3d *January* 1795. The National Convention enjoin all the agents of the Republic and commanders of the armed force, the civil and military officers, to cauſe to be reſpected and obſerved in all their diſpoſitions the treaties which unite *France* to the neutral powers of the whole continent and to the United States of *America*; no attack ſhould be made on thoſe treaties; all diſpoſitions which are contrary thereto are annulled." "12 *Ventoſe* 5th year *F.* R., being 2d *March* 1797. Article 4. Agreeable to the law of the 14th *February* 1793, the directions of the regulations of the 21ſt of *October* 1744 and 26th *July* 1778, concerning the manner of proving the property of neutral ſhips and goods, ſhall be executed according to their form and tenor; conſequently every *American* ſhip ſhall be good prize which ſhall not have on board a muſter-roll of the crew in due form, ſuch as is preſcribed by the model annexed to the treaty of the 6th of *February* 1778. The execution whereof is ordered by the 25th and 27th articles of the ſaid treaty."

It then became a queſtion in this cauſe whether the ſentences of condemnation connected with the treaty, *French* ordinances, and decrees above ſet forth, were to be deemed concluſive againſt the truth of the warranty expreſſed in the policy. The plaintiff and defendant mutually admitted that previous to the capture and condemnation of this and other veſſels on ſimilar grounds no maſter of an *American* ſhip had ever ſigned a liſt con-

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taining the names ſurnames the places of birth and abode of her crew; but ſince thoſe condemnations have been known in *America* ſuch liſts have been conſtantly delivered and certified, under proteſts againſt their neceſſity, and that *American* ſhips having ſuch ſigned liſts have been liberated by *French* cruizers on the production thereof. That for a few years previous to and at the time of the *Rainbow*'s capture an open war ſubſiſted between *France* and other *European* powers, but the United States of *America* were not involved in the war. It was alſo admitted that the plaintiff, if it be open to him to eſtabliſh the truth of his warranty, but ſubject to the legal effect of the above ſentences and papers in a *Britiſh* court, is really a ſubject of the United States of *America*, having been born and domiciled there from his birth; and that he is the ſole proprietor of the ſhip *Rainbow*, and of the freight inſured. The queſtion for the opinion of the Court is whether the plaintiff is entitled to recover, or precluded from ſo doing; if entitled to recover, a verdict to be entered up for 183*l.* 4*s.*; if precluded from recovering, a nonſuit is to be recorded.

This caſe was firſt argued in *Eaſter* term laſt by *Marryat* for the plaintiff, and *Carr* for the defendant; and now by *Law* for the plaintiff, and *Gibbs* for the defendant.

For the plaintiff it was argued that the ſentences of condemnation of the *French* courts do not conclude the queſtion of neutrality againſt the plaintiff, admitting that the ſentence of a foreign court of admiralty of competent juriſdiction is concluſive upon the queſtion "whether enemy's property or not," if the ſentence appear manifeſtly to have proceeded upon that ground; yet if it appear equivocal on the face of the ſentence, much leſs if the concluſion do not reſult from the premiſes ſtated, the plaintiff may give evidence of the fact of neutrality. And here it appears that the premiſes ſtated on the face of the proceedings are inſufficient to warrant a concluſion that the ſhip and cargo were enemy's property. 1ſt, A role d' equipage or liſt of the crew of a neutral veſſel is not neceſſary by the law of nations to ſecure a ſhip from condemnation. Nor was it neceſſary in this caſe, where the commerce of the two countries was regulated by a particular treaty, which provides that in caſe either of the two contracting parties ſhould be at war with a third nation the ſhips of the other ſhould be provided with a ſea letter or paſſport expreſſing the property and deſtination of the ſhip &c; which paſſport was produced in this caſe. This being the only paper ſtipulated to be produced excludes the idea of a role d' equipage being neceſſary. The decree therefore of the Executive Directory of the 12th *Ventoſe* laſt requiring the role d' equipage was not only in contravention of the treaty, and in that reſpect unjuſt and of no validity, but it was impoſſible to comply with it in this caſe, it having been iſſued ſubſequent to the ſailing of the veſſel from *Charleſtown*. By the terms of the treaty it was ſufficient for the maſter to produce his paſſport and the manifeſt of the cargo, which entitled him to proceed without ſearch. This ſtipulation was founded upon the principle that free bottoms made free goods. No argument can be drawn from the prior regulations in *France* of the 26th of *July* 1778, declaring all foreign ſhips in time of war to be good prize which have not on board a liſt of the crew ſigned; for beſides that ſuch an ordinance is contrary to the law of nations, and therefore not binding without a particular agreement to that effect between the reſpective countries, at any rate that regulation was done away by the ſubſequent treaty between *France* and *America*; and there is nothing in the treaty binding the parties to obſerve the particular marine ordinances of the reſpective countries. 2dly, If the particular ordinance of *France* did not bind *America* in this reſpect, then a ſentence of condemnation proceeding on the ground of the non-obſervance of ſuch particular ordinance is not concluſive againſt the warranty of neutrality, but the aſſured may give evidence to prove it complied with. The very ground on which ſuch ſentences of foreign courts of Admiralty are holden to be concluſive is becauſe of the preſumption that they are all governed by the laws of nations; therefore if it appear that *France* has governed its deciſion in this caſe by a law of it's own impoſing in contravention of the law of nations as well as of particular treaty, the ground on which the authority of the ſentence reſts is done away; in the ſame manner as civilized nations would not be bound by the acts or judgments of pirates like the *Algerines*, under whatever colour of law they may aſſume to act. In *Barzillay* v. *Lewis* (*a*) Lord *Mansfield* ſaid that the veſſel which was warranted *Dutch* property had not any of the requiſites of a *Dutch* ſhip. That caſe proceeded on the ground that the ſhip had been condemned by the parliament of *Paris* under her *Engliſh* name of the *Three Graces*, and not merely on the concluſiveneſs of the ſentence as founded upon a marine ordinance of *France*, ſuppoſing the

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(*a*) B. R. Tr. 22 *Geo.* 3. *Park's* Inſur. 410.

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the grounds of the ſentence as appearing on the face of it had been inſufficient. But in *Mayne* v. *Walter* (*a*), where one ground of the condemnation of the ſhip inſured, which was warranted *Portugueſe*, was that ſhe had an *Engliſh* ſupercargo on board at the time of her capture by the *French*, Lord *Mansfield* ſaid it was an arbitrary and oppreſſive regulation contrary to the law of nations, in which caſe if both parties were ignorant of it the underwriter muſt run the riſk, for that it muſt be a fraudulent concealment to vitiate a policy. This goes upon the principle that foreigners are not bound by the marine regulations of any country not conſonant to the laws of nations or warranted by any particular convention between them. So it was ſaid by the Chancellor *Boucher* 13 *Ed.* 4. 9^{b}. 10^{a}. that foreign merchants ſhall not be judged by our ſtatutes when they are introductive of a new law, but by the law of nations. Again, in *Saloucci* v. *Johnſon* (*b*) where a *Tuſcan* ſhip inſured was warranted neutral, and was taken by the *Spaniards*, and condemned as prize on two grounds, firſt, becauſe ſhe reſiſted a ſearch, and ſecondly, becauſe ſhe had no charter-party on board, the Court held the ſentence not concluſive againſt the warranty, as not being founded on the law of nations or the particular convention of the reſpective ſtates. And *Buller* J. there ſaid that detention by particular ordinances which do not form a part of the law of nations is a riſk within the policy, and that a veſſel is only bound to take notice of the laws of the country from and to which ſhe ſails. It is true that in the caſe of *De Souza* v. *Ewer* (*c*) Lord *Kenyon* held the condemnation, which proceeded on the want of documents required by the ordinances of *France* to prove neutrality, to be concluſive: but that was only a niſi prius deciſion and againſt the weight of authorities. But at any rate an ex poſt facto ordinance of a foreign ſtate cannot be binding upon a neutral power; and here it is ſtated that previous to the time when this ſhip ſailed no muſter-roll had ever been required by *France* of *American* ſhips, though there had been a conſiderable maritime intercourſe between the two countries, which ſhews the opinion of *France* itſelf that none ſuch was required by the treaty of 1778. Here the ſentences directly refer to the decree of the Executive Directory of the 12th of *Ventoſe* laſt, and to the other particular ordinances therein named, as the foundation of the judgment of the *French* tribunal.

(*a*) B. R. E. 22 *Geo.* 3. *Park*'s Inſur. 414.

(*b*) B. R. Tr. 25 *Geo.* 3. *ib.* 415.

(*c*) Sittings at G. H. after *Hil.* 1789. *Park*'s Inſur. ch. 18.

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The ſentences are conſiſtent therewith, ſuppoſing them to be binding, and are not conſiſtent with any other ſuppoſed legal ground of condemnation; and this conſideration was relied on in *Bernardi* v. *Motteux* (*a*) as enabling the Court to pronounce on the real grounds of the foreign ſentence there relied on. And there Lord *Mansfield* intimated a ſtrong opinion that if the *French* ſentence of condemnation had proceeded upon the ground of the particular arret of that country, declaring the throwing overboard of papers to be a good ground of condemnation as prize, it would not have been concluſive as to the queſtion of enemy's property. 3dly, Suppoſing it to be ambiguous on what grounds the ſentences proceeded, that is ſufficient (as was ſaid by Lord *Mansfield* in the laſt mentioned caſe) to let in general evidence of the fact. And the general concluſion that this was enemy's property is no more concluſive in this caſe than the general concluſion that the ſhip was *good prize*, which was holden not to be ſo in *Calvert* v. *Boſvill* (*b*).

The plaintiff's counſel then commented on all the particular grounds of condemnation aſſigned in the ſentences, to ſhew their futility; and that in reality the *French* courts did not proceed on any belief of its being enemy's property in fact. On the contrary that the whole tenor of the ſentences proceeded on the aſſumption that the ſhip and property were *American*. That it was not found as an abſolute fact to be enemy's property, but as a deduction from the particular cauſes ſet forth. And therefore this Court was not precluded from receiving evidence of the truth of the warranty.

For the defendant three points were made, 1ſt, That the legal import of the warranty is not merely that the ſhip is *American*-built or belonging to an *American*, but that ſhe is ſo navigated as to give to the underwriter the full effect of her neutrality; in conſideration of which he receives a leſs premium. This is the obvious meaning of every warranty of neutrality, by which it is aſſumed on both ſides that the riſk is ſo much diminiſhed. In the very nature of ſuch a warranty it is preſumed that the ſhip ſhall be poſſeſſed of all the documents required by the particular laws of the country againſt whoſe hoſtility the inſurance is made. 2dly, The ſentences ſet forth in this caſe eſtabliſh that in the judgment of the courts pronouncing them the veſſel inſured was not ſo navigated; and that therefore they for want of ſuch authentic documents confiſcated the ſhip and cargo, as not in their judgment eſtabliſhing

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(*a*) *Dougl.* 554.

(*b*) *Ante*, 523.

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legal proof of her being *American.* But it is objected that it is ambiguous on the face of the ſentences whether they proceeded on the ground of its being enemy's property or not. If indeed that were the caſe, evidence might be let in to explain the real ground of the ſentences: but there is no inſtance of any ſentence not being deemed concluſive which proceeded, as this does, upon the direct adjudication of its being enemy's property. The firſt ſentence concludes with adjudging " the validity of the prize and of the capture and confiſcation of the ſhip and cargo, *the whole being*, for want of Captain Smith's having the papers in due form, *thought to belong to enemies of the Republic*;" and the ſecond ſentence confirms the former one. This concluſion, it is obſervable, is the very ſame recommended by Lord *Mansfield* in *Bernardi* v. *Motteux* (*a*) as the moſt proper to avoid diſpute. This makes an end of any ambiguity in the ſentences. Then, 3dly, If ſuch be the plain foundation of the ſentences, to be collected generally from the whole ſcope of them, this Court cannot, conſiſtently with the admiſſion of the juriſdiction which pronounced them, examine into their merits or reverſe them under any circumſtances, upon the ground of their error or injuſtice. It is contended however that this may be done where the error or injuſtice appears manifeſtly upon the face of the ſentences. But it would be difficult to draw any line between caſes where a greater or leſs degree of error is imputed: this would be to aſſume the privilege and duty of a court of reviſion and appeal; whereas all the caſes admit that a foreign ſentence is concluſive as to the grounds on which it is made. In *Bernardi* v. *Motteux* Lord *Mansfield* ſaid that much difficulty would be ſaved if the foreign ſentences would declare in terms that the condemnation proceeded on the ground of its being enemy's property, in order to preclude any inveſtigation of the particular grounds from whence the concluſion was drawn. But if the general principle be true, it is needleſs to inquire whether from the premiſes ſtated this Court would have drawn the ſame concluſion. Though if that were neceſſary, there are not wanting authorities to ſhew that the non-compliance with the particular ordinances of a country is a good ground of confiſcation; as in the caſe of *De Souza* v. *Ewer* (*a*), which proceeded on that ground alone. But further it appears that this ſhip was not furniſhed with all the proper documents required by the particular treaty between *France*

(*a*) *Park*'s Inſur. ch. 18.

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and *America*; for ſhe had not the liſt of the crew as required by the model annexed to the treaty of 1778; and this is expreſsly recognized in the very terms of the paſſport. Therefore the paſſport itſelf was void, becauſe the terms on which alone it could properly be obtained could not be complied with, for the captain could not ſwear to his crew as he did not know them. In *Calvert* v. *Boſvill* the Court had no doubt but that the ſentence of a foreign court of competent juriſdiction was concluſive as to the ſubject-matter of their judgment, if it appeared upon what ground it proceeded, however dubious the propriety of that concluſion might be.

In reply, it was contended that the extent of the warranty of neutrality was only againſt the legal detention or condemnation of the ſhip; and ſo far the party was bound to provide the proper ſhip documents required by the laws of nations or particular treaties; but that the warranty did not extend againſt acts of piracy or illegal violence. That the grounds on which the *French* courts proceeded muſt be beſt known by referring to their proceedings, and obſerving the queſtions they propounded to themſelves and the anſwers given by them; from whence it is demonſtrable that they proceeded upon the ground of their own illegal and ex poſt facto ordinance, by which *America* was not bound. But at any rate, ſuppoſing *France* by a particular ordinance of her own could inſiſt on the production of a document not rendered neceſſary by the treaty, the want of it, however it might ſubject the veſſel to ſuſpicion detention and ſearch, could be no ground for confiſcation, and conſequently no impeachment of the warranty that the veſſel and property were in fact *American*, if in the reſult it ſo appeared.

Lord Kenyon Ch. J. When this caſe was argued in the laſt term the parties deſired to have a ſecond argument; to this the Court readily acceded from an anxious wiſh that it might produce ſuch arguments and reaſons as would enable them to form a judicial opinion according to their individual feeling. The ſituation of Judges is ſuch that they are ſometimes obliged to decide againſt their own feelings as men. We come to decide this caſe bound and ſhackled by certain rules from which we dare not depart. The acts of pirates are to be treated as the acts of pirates: they do not profeſs to have any civil code of laws by which they are to be reſtrained. But civiliſed nations profeſs to be governed by certain rules, and the comity due from the courts in one country to thoſe in another induces them to give credit to each other's acts;

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and ſo we muſt continue to act in this country until the Legiſlature ſhall think fit to forbid it. There is the ſame comity between the different courts in this kingdom. Where there has been a proceeding in the Exchequer and a judgment in rem, as long as the judgment remains in force it is obligatory on the parties who have civil rights depending on the ſame queſtion. Not long after Lord *Mansfield* came into this court, in an action brought againſt an officer of the cuſtoms or exciſe, he was told by Mr. J. *Deniſon* that as the queſtion had been already decided in the Exchequer by a condemnation of the goods ſeized the judgment of that Court was concluſive in favour of the defendant here; at firſt Lord *Mansfield* doubted the propriety of that opinion, but on inquiry finding that Mr. J. *Deniſon* was right he acquieſced, and always afterwards acted upon it. I admit the caſes of *Mayne* v. *Walter* and *Saloucci* v. *Johnſon* up to their extent; I admit that, if a foreign Court of Admiralty proceed on grounds contrary to the law of nations, their judgment ought not to have weight in the courts of this country. But let us ſee what this caſe is: the ground on which the courts in *France* proceeded was that this was a capture of enemy's property; and it certainly is not contrary to the law of nations to condemn a ſhip on that ground. Whether or not thoſe courts arrived at that concluſion by proper means I am not at liberty to enquire; here the queſtion is whether they have not ſtated as the ground of condemnation a ground which will bear them out, ſuppoſing it to be true? and I am clearly ſatisfied that they have. They concluded from the evidence that this was enemy's property, not indeed in the formal language of our courts of juſtice, but they ſay in ſubſtance "We think this is enemy's property, and therefore we condemn the ſhip and cargo." Now that concludes this caſe; for as long as the foreign judgments are binding upon us, the concluſion that we muſt draw from the judgments in this caſe in *France* is that the property which was warranted to be *American* is found by that judgment not to be *American* property. I feel this however as the groſſeſt injuſtice towards the *Americans*. The *French* courts ſeem in this inſtance to have proceeded on *Algerine* (nay on worſe) principles; becauſe they profeſſed to proceed according to law but in reality made the law a ſtalking-horſe for an act of piracy. But I cannot now queſtion the legality of their deciſion; I am bound to decide according to the law; it is my duty jus dicere et non jus dare.

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ASHHURST J. Though moſt probably we ſhould not have given the ſame judgment as the *French* courts gave, if the queſtion of neutrality had firſt ariſen here, it is not open to us now to canvaſs that queſtion. Thoſe courts had competent juriſdiction over the ſubject-matter; and it is an eſtabliſhed rule that the judgment of a foreign court, whether it be the court of a country at enmity or in amity with us, is concluſive if the ſame queſtion ariſe again here. Now as the *French* courts have already given a judicial opinion upon this queſtion, it muſt govern us whatever may be our opinions concerning the real merits of the caſe.

GROSE J. I agree in the opinion already given. But I cannot expreſs in better terms than my Lord *Kenyon* that I feel myſelf bound to give judgment in favour of the defendant, and at the ſame time lament the neceſſity of ſo deciding.

LAWRENCE J. If we could have examined the grounds on which the *French* courts determined this to be enemy's property, probably we ſhould have formed a different concluſion: but we cannot review thoſe judgments here. They have decided the queſtion, though by no means according to my opinion: but having ſo decided, the rule undoubtedly is, that whenever a court of competent juriſdiction has decided any queſtion, and the ſame queſtion ariſes incidentally in another court, the latter is concluded by the former judgment. The caſe of *Hughes* v. *Cornelius* (*a*) ſhews that this rule is not confined to judgments given in our own courts; there in an action of trover for a ſhip and goods, a ſpecial verdict was found ſetting forth a ſentence in the Admiralty Court in *France*, which was in favour of the defendant, and "*Per Curiam*, Agreed and adjudged that as we are to take notice of a ſentence in the Admiralty here, ſo ought we of thoſe abroad in other nations, and we muſt not ſet them at large again, for otherwiſe the merchants would be in a pleaſant condition; for ſuppoſe a decree here in the Exchequer, and the goods happen to be carried into another nation, ſhould the courts abroad unravel this? It is but agreeable with the law of nations that we ſhould take notice and approve of the laws of their countries in ſuch particulars." According to all the authorities therefore I think we are concluded in this caſe by the judgments given in *France*, however we may feel the impropriety of thoſe deciſions.

Judgment for the defendant.

(*a*) 2 *Show.* 232.

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Friday, June 15th.

SHIPLEY *againſt* COOPER.

The defendant cannot change the venue after an order for time to plead, on the terms of pleading iſſuably and taking ſhort notice of trial for the firſt Sittings in London or Middleſex.

HOVELL obtained a rule to ſhew cauſe why the rule obtained by the defendant for changing the venue from *Middleſex* to *Lancaſter* ſhould not be diſcharged, the former rule having been made after the defendant had obtained time to plead under the terms of pleading iſſuably and taking ſhort notice of trial for the firſt Sittings after term.

Giles, who now ſhewed cauſe, relied on the caſe of *Wightman* v. *Thompſon* (*a*), where the Court changed the venue after an order for time to plead on pleading iſſuably and taking ſhort notice of trial for the Sittings in term in *Middleſex*. But

The Court, on a reference to the Maſter, ſaid that now the practice (*b*) was otherwiſe; and they made this rule abſolute to ſet aſide the former rule.

Rule abſolute.

(*a*) 1 *Wilſ.* 245.

(*b*) The diſtinction ſeems to be this; the venue may be changed after an order for time to plead, though upon the terms of pleading iſſuably: but if the defendant has agreed to plead iſſuably *and to take ſhort notice of trial for the firſt Sittings in* London or Middleſex, he cannot then change the venue, becauſe there a trial would be loſt. *Petyt* v. *Berkeley*, *Cowp.* 511. *Hunter* v. *Gray*, *Barnes*, 493.

Saturday, June 16th.

OWENS *againſt* DUBOIS.

The Court will give the plaintiff leave to *amend* his declaration after the ſecond term even againſt a priſoner; but they will not permit him *to add new counts* to his declaration in ſuch a caſe.

THE plaintiff declared againſt the defendant by the name of *John Herbert Valentia Dubois*; the defendant pleaded in abatement that his name was *John* Hubert *V. D.* The plaintiff then declared againſt him by the name of *John Hubert* alias *Herbert V. D.*, to which the defendant again pleaded in abatement that his name was *John Hubert V. D.*, and not *John Hubert* alias *Herbert V. D.* The defendant had been arreſted in laſt *Michaelmas* vacation. If the preſent declaration were abandoned and the plaintiff were now obliged to file a new declaration, the defendant would be entitled to be diſcharged on the ground that the plaintiff had not declared within two terms. Therefore

Gibbs, on behalf of the plaintiff, now moved to amend the declaration by ſtriking out the words " alias *Herbert*."

Chambre oppoſed this in the firſt inſtance. He ſaid it would be giving the plaintiff an unjuſt advantage, becauſe as two terms had already elapſed ſince the defendant was in cuſtody, he would now be entitled to be diſcharged if the preſent declaration could not be ſupported; and that there was no reaſon for allowing this indulgence to a plaintiff by giving him a third term, ſince the plaintiff himſelf had been in the wrong throughout the whole cauſe. And he cited the caſe of *Aubeer* v. *Barker* (*a*), where the Court would not allow the plaintiff to amend his declaration by adding two counts in the third term in a caſe where the defendant was a priſoner. But

The Court obſerved that this was diſtinguiſhable from the caſe cited, where the application was to make a new charge againſt the defendant by inſerting two new counts in the declaration, whereas this motion was merely to amend by ſtriking two words out of the preſent declaration; and they ſaid that, when the amendment was made, it would be conſidered as a declaration from the time when it was firſt filed.

Rule abſolute on payment of coſts.

(*a*) 1 *Wilſ.* 149.

The King on the Proſecution of W. E. Dillon *againſt* The Mayor and Burgeſſes of Grampond.

Saturday, June 16th.

After verdict on a traverſe to a return to a mandamus made by a corporation the Court would not allow the defendants to amend the return, by ſetting forth a different conſtitution.

To a mandamus, commanding the defendants to reſtore *W. E. Dillon* to the office of a capital burgeſs of *Grampond*, the defendants returned (inter alia) that the borough of *Grampond* was an immemorial borough and corporation; that [the borough][1] hath immemorially [conſiſted of][2] a mayor [recorder][3] eight [capital][4] burgeſſes [ ][5] inhabiting and reſiding within the borough to adviſe the mayor touching the good rule and government of the borough and the adminiſtration of juſtice, [a town clerk][6] and an indefinite number of freemen or free burgeſſes; that the capital burgeſſes have immemorially been uſed and accuſtomed to reſide and inhabit and of right ought to have reſided and ſtill of right ought to reſide and inhabit within the ſaid borough for the purpoſe of attending and executing the ſeveral duties of

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the ſaid office; that *Dillon*, who was in *October* 1792 elected and ſworn into the office of a capital burgeſs, had not ſince his election inhabited or reſided within the borough; that at a meeting holden on the 16th of *April* 1796, at which the mayor the capital burgeſſes to the number of eight (including the ſaid *W. E. Dillon*) and a majority of freemen or burgeſſes attended, in anſwer to a charge againſt *Dillon* for not reſiding within the borough and neglecting the duty and execution of his office of which he had received previous notice, *Dillon* admitted that he had not reſided within the borough, which he had been prevented doing by not having been able to find a houſe for the accommodation of himſelf and his family, but inſiſted that he had never neglected the duty and execution of his office, but had always diſcharged the ſame; that at that meeting the mayor and burgeſſes ſo aſſembled, having heard the charge and the defence and taken the whole into their conſideration, adjudged that *Dillon* had been guilty of non-reſidence and removed him from his office of a capital burgeſs for ſuch non-reſidence.

The proſecutor traverſed the cuſtom for the capital burgeſſes to reſide within the borough, on which iſſue was joined.

At the trial in *Cornwall* before Mr. J. *Lawrence* the jury found a verdict for the defendants, eſtabliſhing the cuſtom ſet out in the return.

A rule was afterwards obtained calling on the defendants to ſhew cauſe why there ſhould not be a new trial, on the ground that the verdict given was againſt the weight of evidence, or in caſe the Court ſhould refuſe to grant a new trial why a peremptory writ of mandamus ſhould not iſſue, commanding the defendants to reſtore the proſecutor to the office of a capital burgeſs, on the ground of the inſufficiency of the return to the mandamus: the former branch of the rule was, after argument at the bar, diſcharged. The latter part of the rule came on to be argued in the laſt term, when the Court during the argument intimating an opinion that the return was inſufficient in not ſtating that the removal had been made by the whole corporation, the recorder not having been preſent at the meeting when *Dillon* was removed, another rule was obtained by the defendants calling on the proſecutor to ſhew cauſe why the return ſhould not be amended in ſeveral particulars. The propoſed amendments were in the parts (*a*) included within the ſix parentheſes in the return; to ſubſtitute for the words

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(*a*) *Sup.* 699.

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"the borough"[1] the words "in the borough aforeſaid there have;" to inſert "been" for "conſiſted of;"[2] to omit "recorder,"[3] and inſert the word "and" inſtead; to inſert the words "of the" inſtead of "capital;"[4] to add[5] "of the borough aforeſaid elected in manner hereinafter-mentioned;" and to ſtrike out "a town clerk,"[6] inſerting inſtead "who during all the time aforeſaid have been and ſtill are called capital burgeſſes of the ſaid borough."

Lens and *Dampier* now ſhewed cauſe againſt the laſt rule for the amendments. Formerly the courts were very ſtrict in permitting amendments to be made in records: they would only allow an amendment in caſes where there had been a miſpriſion of the clerk, *R.* v. *The Mayor* &c. of *Chicheſter*; 1 *Show.* 273.; probably taking the rule from the ſtat. 8 *Hen.* 6. *c.* 12. which is confined to the inſtances of miſpriſions of clerks. "A mere clerical miſpriſion in a return may be amended." *Com. Dig.* "Mandamus," (D. 5). In *R.* v. *The Mayor* &c. of *Lyme Regis* (*a*), a mere clerical miſtake was amended in a return to a mandamus after it was filed. And though perhaps the court would now extend the rule for amending farther in the inſtance of a return to a mandamus, as they have of late extended it in other inſtances, they will only permit amendments to be made in proper caſes and for the furtherance of juſtice and in certain ſtages of the cauſe. But here both the object to be attained and the ſeaſon when the application was made furniſh objections to the preſent rule. In the firſt place, the amendments are not propoſed to further the juſtice of the caſe. It muſt be taken on this record that *Dillon* has regularly diſcharged all the duties of his office, and that he was removed not for any neglect of duty but ſimply for non-reſidence within the limits of the borough; he was therefore removed for non-compliance with a mere form. Then the public are not intereſted in removing him from his office; and if the corporation wiſh it, they may ſtill amove him for the ſame cauſe. In the next place, the application comes too late, after verdict. There is no inſtance of an amendment after the return filed, except that of *R.* v. *Lyme Regis*, and there the amendment was of a mere clerical miſtake. But this is after verdict, and after an objection taken to the return for this very defect. The defendants wiſhed to take their chance of ſucceeding by ſtating the removal of the

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(*a*) *Dougl.* 135.

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proſecutor by one deſcription of corporators, and finding that that cannot be ſupported they now wiſh to ſubſtitute another deſcription of corporators in their room. If the preſent application ſhould ſucceed, whenever a motion is made in arreſt of judgment, the other party will move to amend; ſo that in future no judgment will ever be arreſted. In *Harriſon* v. *Godman* (*a*), where an objection was taken to the return to a writ of *habeas corpus cum cauſâ* that no cuſtom was ſtated to ſupport a bye-law in reſtraint of trade, though the cuſtom in fact ſubſiſted, yet it never occurred to the counſel in that cauſe to move to amend.

Gibbs, *Cowper*, and *Praed*, in ſupport of the rule. Firſt, it is clear that the Court have the power of permitting the amendments to be made in this caſe, either by the common law, or by the ſtat. 9 *Ann.* *c.* 20. "for rendering the proceedings upon writs of mandamus &c more ſpeedy and effectual," and which enacts that the ſtat. 4 *Ann.* *c.* 16. "for the amendment of the law and the better advancement of juſtice" and all the ſtatutes of jeofails ſhall be extended to all writs of mandamus and the proceedings thereon. Then, 2dly, this is a caſe in which the Court in their diſcretion ought to allow the amendments to be made. The proſecutor, inſtead of objecting to the return in the firſt inſtance carried the record down to trial, and there finding the fact againſt him he now deſires the Court to adjudge the return to be bad for an objection, which, if he had intended to rely on it, he ſhould have made before trial. The principal amendment propoſed is an amendment of a mere formal miſtake; ſince the recorder is not a freeman or free burgeſs of the borough and has no right to vote at any corporate meeting (*b*), and conſequently his non-attendance at the meeting at which *Dillon* was removed is immaterial. This amendment is therefore only according to the fact. Now the proſecutor, having taken iſſue on a fact which is not true, is not entitled to any favour from the Court. There is no reaſonable objection to the propoſed amendments, either on account of the form of proceeding by mandamus, or of the time when the application was made. In *R.* v. *Armſtrong* (*c*), an amendment as to the conſtitution of the borough of *Scarborough* was allowed in a plea to a *quo warranto* information, where the ſame ſtrictneſs is required as in a return to a mandamus. That

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(*a*) 1 *Burr.* 12.

(*b*) This did not appear on the record, but the fact was ſo ſtated in an affidavit.

(*c*) *Andr.* 109.

amendment was granted on the authority of ſeveral caſes there cited; The Executors of the Duke of *Marlborough* v. *Widmore*, 2 *Str*. 890; *Moſtyn* v. *Totty*, M. 2 *Geo*. 2; and *Bearecroft* v. The Hundreds of *Burnham* and *Stove*, 3 *Lev*. 347. So in *R*. v. *Philips* (*a*) and in *R*. v. *Ellames* (*b*) an amendment was allowed in a plea to a quo warranto information. And with regard to the time of making this application, it may be obſerved that amendments have been made in other caſes after verdict and even judgment. In *Richards* v. *Brown* (*c*) an amendment was allowed after error brought; and in the notes to that caſe ſeveral other caſes to the ſame effect are referred to. So in *Phillips* v. *Smith* (*d*) an amendment was granted after verdict and a writ of error brought. Again in *R*. v. *Phillips* (*a*) and *R*. v. *Ellames* (*b*) the amendments were permitted to be made, in the firſt after verdict, in the other after a demurrer; and in the latter Lord *Hardwicke* Ch. J. ſaid "It was anciently the rule not to ſuffer any of thoſe amendments to be made after the matter was on record: but the number of caſes now cited ſhew that of late in furtherance of juſtice and in order to obtain the right between the parties theſe amendments have been much extended."

Lord KENYON Ch. J. I wiſh that that could be attained that Lord *Hardwicke* in the caſe before him lamented could not be done, namely, "that theſe amendments were reducible to ſome certain rules:" but there being no ſuch rule, each particular caſe muſt be left to the ſound diſcretion of the Court. And the beſt principle ſeems to be that on which Lord *Hardwicke* relied in the ſame caſe, that an amendment ſhall or ſhall not be permitted to be made as it will beſt tend to the furtherance of juſtice. Amendments of this kind are not made under the ſtatutes of jeofails, but under the general authority of the Court. That the Courts formerly had great reluctance in allowing amendments to be made appears clear from the firſt caſe cited from *Shower*. But the deciſion in that caſe as well as that in *R*. v. *Lyme Regis* and *R*. v. *Ellames* proceeded on the ground mentioned by Lord *Hardwicke*, that the amendments in thoſe caſes were in the furtherance of juſtice. In the latter caſe if the title of *Ellames*, as mayor, had been holden to be defective, many derivative titles might have been diſturbed, becauſe the record of the judgment of ouſter

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(*a*) 1 *Burr*. 292.

(*b*) *Rep*. *Temp*. *Hardw*. 42.

(*c*) *Dougl*. 114.

(*d*) 1 *Str*. 136.

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againſt him would have been evidence againſt thoſe who derived title under him. But it does not appear that this caſe involves in it the title of any other perſon. So in the caſe cited from 3 *Lev.* the ground on which the Court proceeded was this, "Seeing that the time limited by the ſtatute for bringing the action was elapſed, and ſo the action loſt if it were not amended," the Court ruled it ſhould be amended. And in the caſe of *R.* v. *Phillips* the amendment granted was in the nature of a repleader; and a repleader is granted when the iſſue is wholly unimportant: but here the facts to be introduced by the propoſed amendment are of great importance. Conſider what this caſe is; the proſecutor, who had attended all corporate meetings and had in fact diſcharged all the duties of his office, was removed from his office of capital burgeſs for not reſiding within the limits of the borough; it ſeems therefore to be a harſh proceeding againſt him. We are not acquainted with the motives and reaſons for removing the proſecutor: but perhaps it might have been convenient to ſome of the parties that the recorder ſhould appear to be an integral part of the corporation, and that this return ſtating that the corporation conſiſted of a mayor recorder eight capital burgeſſes and a town clerk ſhould be on the files of the court; probably this was an experiment to try whether or not that could be found by a jury; and now that they find that that averment bears againſt them in another point of view, they wiſh to have it altered. On reviewing the caſes it is manifeſt that the Court has ſeldom indulged the parties by permitting amendments to be made in a return to a mandatnus after the mandamus has been filed. The ground on which my opinion is formed in this caſe is, that the amendments propoſed are not for the furtherance of juſtice, and it is an attempt to carry the rule of amendment farther than it has ever been extended in any other caſe. If the corporation are ſtill pertinacious, they may remove the proſecutor again, and then they will have an opportunity of putting ſuch a conſtitution of the corporation on record as they will abide by: but I cannot aſſent to this rule.

Ashhurst J. I am inclined to permit amendments to be made where it is proper to make them: but it does not appear to me that this is a proper caſe for an amendment. The rights of no other perſons are affected by this proceeding; and there ſeems to be ſome harſhneſs in removing the proſecutor, ſince he regularly

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larly attended to diſcharge his corporate duties, and the corporation were not injured by his not reſiding within the limits of the borough.

Grose J. This application is made not only after the return was filed but after verdict, and the object of the verdict is to take from the proſecutor his franchiſe. It is obſervable that there is no inſtance of ſuch amendments as thoſe propoſed in this caſe; for the caſes cited are caſes of amendments of critical errors. And we ſhould be cautious in permitting ſuch amendments to be made, unleſs they tend to the furtherance of juſtice. But I think it will be as much in the furtherance of juſtice to permit the proſecutor, who has always hitherto performed his duty, to continue in the enjoyment of his office, as to deprive him of his franchiſe. Therefore I think that this rule ought to be diſcharged.

Lawrence J. This is an application to the diſcretion of the Court. And though it muſt now be admitted that many amendments have been allowed in a late ſtage of the proceedings, ſtill it ought to appear to the Court that there is ſome reaſonable ground for permitting the amendment propoſed. In *Atkins* v. *Hill* (*a*), which was aſſumpſit againſt an executor who (it was alleged) in conſideration of aſſets had promiſed to pay, the defendant demurred, and after argument the defendant moved to withdraw the demurrer and deny the promiſe, but the Court would not allow the amendment in ſuch a caſe. So here, this is not a caſe in which we ought to allow the amendments to be made.

Rule diſcharged (*b*).

(*a*) Vid. *Cowp.* 284.

(*b*) The other rule reſpecting the inſufficiency of the return has not yet been formally diſpoſed of.

Rich *againſt* Parker.

Monday, June 18th.

A warranty in a policy of inſurance that the ſhip is American property means that the ſhip is entitled to all the privileges of an American flag: and if ſhe has no paſſport on board (which is required by the treaty between France and America) the warranty is not complied with, and the aſſured cannot recover againſt the underwriter, though in fact the ſhip ſuffers no inconvenience in the voyage from the want of the paſſport.

This was an action on two policies of inſurance, one on the ſhip, the *Atlantic*, the other on goods on board her, from *London* to *Guernſey*, from thence to the coaſt of *Africa* during her ſtay and trade there, and at and from thence to her port or ports of diſcharge in all or any of the *Britiſh Weſt-India* Iſlands

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and *America*. The ſhip and goods were warranted to be *American* property. The plaintiff averred that the ſhip and goods were *American*, and then ſtated that the ſhip ſailed from *London* to *Guernſey* and from thence to the coaſt of *Africa* where ſhe was captured by an enemy.

The defendant pleaded the general iſſue, and on the trial before Lord *Kenyon* at *Guildhall* a ſpecial verdict was found; which (after ſtating the making of the policies, the ſailing and capture of the ſhip as ſet forth in the declaration,) ſtated that the ſhip, the *Atlantic*, was an *American* ſhip and the property of the plaintiff, a native and citizen of the United States of *America*, and that the goods were *American* property. It then ſet forth the treaty between *France* and the United States of *America* in 1778; in which it was agreed (inter alia) that the ſhips and veſſels belonging to the ſubjects of the other ally muſt be furniſhed with ſea-letters or paſſports expreſſing the name property and bulk of the ſhip as alſo the name and place of habitation of the maſter or commander of the ſhip, that it might thereby appear that the ſhip really and truly belonged to the ſubjects of one of the parties; which paſſport ſhould be made out and granted according to the form annexed. And it was further agreed that if the ſhips of the ſubjects of either of the parties ſhould be met with, either ſailing along the coaſt or on the high ſeas by any ſhips of war of the other, or by any privateers, the ſhips of war or privateers for the avoiding of any diſorder ſhould remain out of cannon-ſhot and might ſend their boats on board the merchant ſhip which they ſhould ſo meet with, and might enter her to the number of two or three men only, to whom the maſter or commander of ſuch ſhip or veſſel ſhould exhibit his paſſport concerning the property of the ſhip, made out according to the form inſerted in that treaty. And that the ſhip when ſhe ſhould have ſhewn ſuch paſſport ſhould be free and at liberty to purſue her voyage, ſo as it ſhould not be lawful to moleſt or ſearch in any manner or to give her chaſe or to force her to quit her intended courſe. The verdict then ſtated that before and at the time of ſailing of the ſhip &c. this country was engaged in a war with *France*; and that the ſhip when ſhe ſo ſailed from *London* on her voyage for *Guernſey* had not on board any ſea-letter or paſſport made out and granted for her according to the form annexed to the treaty; but that at the time of her ſailing from *Guernſey* and from thence continually afterwards until and at the time of the

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capture ſhe was furniſhed with and had on board her ſuch a ſea-letter or paſſport &c, and which was exhibited and ſhewn at the time of her capture and loſs by the maſter of the ſhip to the commander of the *French* privateer. But whether &c.

Park, for the plaintiff, after ſtating the queſtion to be whether or not the warranty in the policy that the ſhip and cargo were *American* property had been complied with, argued in the affirmative. Whether or not a warranty has been complied with is a queſtion of fact to be eſtabliſhed by evidence: now here that fact is expreſsly found by the jury, and that precludes all farther argument. The defendant however inſiſts that the ſhip was not *American*, becauſe ſhe had not the paſſport on board during the former part of the voyage. But in the firſt place the paſſport was on board before and at the time of the capture; and it does not appear that the ſhip ſuffered the leaſt inconvenience or interruption from not having it on board when ſhe ſailed from *London* to *Guernſey*. And in the next place the want of that paſſport neither negatives the warranty that the ſhip and goods were *American*, nor was it a cauſe of ſeizure or confiſcation either by the law of nations or by the treaty between *France* and *America*. Whether the ſhip were or were not *American* is one queſtion, whether or not ſhe had the paſſport on board is another, not depending on the former. There is no pretence to ſay that the want of this paſſport was a cauſe of ſeizure or confiſcation by the law of nations. It has never been holden that the want of ſuch a paper diſproved the warranty of neutrality. The want of certain documents may indeed afford a ground of ſuſpicion that the ſhip is not neutral, and when connected with other circumſtances may be a ground of confiſcation: but there is no inſtance of a ſentence of condemnation merely on the ground that the ſhip had not particular papers on board. Even if there had been a ſentence in a foreign court condemning this ſhip on this ground, and that reaſon had been ſtated as the foundation of the ſentence, it would not have been concluſive here. *Calvert* v. *Bovill*, *ante* 523. The circumſtance of material papers being thrown overboard juſt before the ſhip is taken raiſes a ſtronger ſuſpicion than the want of ſuch a document as a paſſport, but that alone is not a ſufficient ground of condemnation. *Bernardi* v. *Motteux*, *Dougl.* 574. And in *Saloucci* v. *Johnſon* (*a*) it was not even argued that the want of a charter-party was a ground of condemn-

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(*a*) *Park's* Inſur. 415.

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condemnation. Then conſidering the treaty between *France* and *America*, the requiring of the paſſport is merely a regulation of convenience between the two ſtates, having for its object that which is ſtated in the treaty "ſo as it ſhould not be lawful to moleſt or ſearch in any manner or to give her chace or to force her to quit her intended voyage." By the law of nations any ſhip may be ſtopped on the high ſeas in time of war by either of the belligerent powers in order to examine whether ſhe is carrying any ſuccours to an enemy, to avoid which one of the articles in this treaty was inſerted. The infraction of this treaty may be a cauſe of complaint as between the two nations, but as between the ſubjects of one of thoſe nations and the ſubjects of any other nation it is not a cauſe of confiſcation, nor does it diſprove the warranty of neutrality. If indeed the ſhip had been ſtopped on the high ſeas and for want of this paper had been carried into a *French* port, perhaps that might have avoided the policy on the ground of a deviation, inaſmuch as that would have ariſen from the maſter's neglect: but that was not the caſe here, the paſſport being on board when the ſhip was taken.

Giles for the defendant. It is not ſufficient for the inſured to ſay that the ſhip and cargo were *American*; in order to charge the underwriter it muſt appear that the ſhip had all the privileges of an *American* flag. Now it is ſtated in this verdict that the ſhip in queſtion when ſhe firſt ſailed had not the paſſport which is required by the treaty with *France*, and that ſubjected her to greater riſks and interruptions than ſhe would have been ſubject to if ſhe had had this paſſport, and therefore the underwriter is diſcharged. This comes within the principle on which the caſes of *Law* v. *Hollingworth* (*a*) and *Farmer* v. *Legg* (*b*) were decided, where it was holden that the aſſured could not recover; in the latter becauſe the Captain of an *African* ſlave ſhip had not the certificate of his ſervice required by the ſtat. 31 *Geo.* 3. *c.* 54. *ſ.* 7., in the former becauſe there was no pilot on board; and in which caſe Lord *Kenyon* ſaid "The principle on which this caſe muſt be determined ſeems to be admitted on all hands, namely, that the aſſured cannot recover on a policy of aſſurance unleſs they equip the ſhip with every thing neceſſary to her navigation during the voyage; the ſhip herſelf muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill." It is not neceſſary for

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(*a*) *Ante* 160.

(*b*) *Ante* 186.

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the defendant to contend that the want of a paſſport in this caſe would have been a good ground of confiſcation; it is enough if it ſubjected the ſhip to certain interruptions and detentions in her voyage, to which according to the terms of the contract ſhe ſhould not have been ſubject. The defendant had a right to expect that the ſhip ſhould ſail having every thing on board to prevent her being rightfully ſtopped and carried into an enemy's port. The circumſtance of the ſhip's having this paper on board after ſhe ſailed from *Guernſey* is perfectly immaterial; becauſe the warranty extended during the whole voyage, and her not having this paſſport when ſhe ſailed was a non-compliance with the warranty. The caſe of *Barzillay* v. *Lewis* (*a*) is a ſtrong authority in favour of the defendant; for there though the ſhip which was warranted *Dutch* property was *Dutch* property, yet as ſhe had not on board ſuch a paſſport as was required by the regulations of *France*, it was holden that the aſſured could not recover.

Lord KENYON Ch. J. Notwithſtanding a wiſh has been expreſſed (*b*) that there may be a ſecond argument in this caſe, I cannot forbear ſaying what occurs to me at preſent on this ſubject. On the trial I gave my opinion ſtrongly in favor of the defendant, and I have no reluctance in ſaying I continue of the ſame opinion. This was an inſurance from *London* to *Guernſey*, from thence to the coaſt of *Africa* and during her trade there and from thence to the *Weſt Indies*. Now nothing can be clearer than this, that if a ſhip that is inſured be not ſea-worthy or in a proper condition for ſailing during any part of the voyage, nothing that happens afterwards can better her original ſituation. By the treaty between *France* and *America*, referred to in the caſe, it is agreed that the ſhips and veſſels belonging to the ſubjects of either ally muſt be furniſhed with ſea-letters or paſſports &c. Now I think that the warranty in this policy, that the ſhip was *American* property, is not ſatisfied by merely ſhewing that in fact the ſhip was *American* property. When theſe parties entered into the contract of inſurance, the underwriter was to be indemnified to a certain extent under this warranty; the ſhip was not only not to be liable to riſks ariſing from her not being *American* property, but ſhe was not to be liable to any inconvenience or impediment in her voyage from her not being in the condition required by the treaty with *France*.

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(*a*) *Park's* Inſur. 410.

(*b*) During the argument the parties expreſſed a wiſh to have the caſe argued again.

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The queſtion here is whether or not this ſhip was in ſuch a ſituation as to be entitled, in the words of the defendant's counſel, to all the privileges of an *American* flag; I think ſhe was not. It is true perhaps that the *French* had no right to confiſcate the ſhip for not having the paſſport on board, if in fact it were proved that ſhe was an *American* ſhip: but under the terms of this treaty the *French* had a right to do certain acts which they could not have done according to the treaty if the paſſport had been on board. If the paſſport were on board the *French* ſhips were not to come within cannon-ſhot, nor to chaſe or drive her out of her voyage, and they were not to ſend more than two or three men on board; which negative implies an affirmative, that in caſe ſhe had no paſſport on board the *French* would not have been guilty of any infraction of the treaty if they had forced this ſhip out of her voyage. The parties to this contract of aſſurance meant that the underwriter ſhould not be liable to ſuch riſks: but the ſhip was ſubject to theſe riſks and inconveniences through the neglect of the aſſured, becauſe he did not do all that was required by the treaty. Might not this ſhip have been carried into a *French* port and the voyage been thereby delayed for want of this paſſport, though perhaps ultimately ſhe would not have been liable to confiſcation? And is not that a greater riſk than the underwriter engaged to inſure in the caſe of a ſhip warranted *American?* It is true that the loſs did not happen in conſequence of the ſhip not having a paſſport: but ſtill the underwriter was thereby put to greater riſk than he would have been if the ſhip had had this document on board. I am therefore of opinion as at preſent adviſed that the plaintiff has no right to call on the underwriter.

Ashhurst J. The warranty that the ſhip was *American* does not mean merely that the ſhip was *American*-built, but that ſhe was entitled to all the privileges and indemnities of an *American* ſhip, otherwiſe it makes a difference in the value of the riſk; and in order to be entitled to theſe privileges ſhe ſhould have had a paſſport. The aſſured ought to diſcloſe to the underwriter all the circumſtances within his knowledge that may affect the quantum of the riſk: now if the underwriter had been informed that this ſhip would not have any paſſport on board in the firſt part of the voyage from *London* to *Guernſey*, perhaps the underwriter would not have inſured for the ſame premium. For this reaſon I think that the plaintiff is not entitled to recover in this action.

GROSE J. Although this appears to be the firſt caſe of the kind, I think that the principle eſtabliſhed in the caſes of *De Hayn* v. *Hartley* (*a*) and *Barzillay* v. *Lewis* muſt decide it. It was there holden that if a warranty be not ſtrictly complied with the underwriter is diſcharged; and in the latter my Brother *Buller* ſaid "The ſtrongeſt ground ſeems to be that ſhe was warranted to be *Dutch* property, and yet had none of the documents neceſſary to protect a neutral ſhip conſiſtent with the regulations of the court of *France*."

LAWRENCE J. It was taken for granted by the plaintiff's counſel that it muſt be conſidered by the finding of the jury that the warranty was complied with: but they have only found the fact that the ſhip was *American* property; it remains for the Court to explain the meaning of the warranty. Now if the meaning of the warranty be that the ſhip is entitled to all the privileges of an *American* flag, then this warranty was not complied with; and that ſeems to me the fair conſtruction of the policy. Therefore I think the plaintiff is not entitled to recover.

Judgment for the plaintiff niſi (*b*).

(*a*) *Ante*, 1 vol. 343.

(*b*) On a ſubſequent day in the term the plaintiff's counſel, finding the opinion of the Court ſo ſtrongly againſt him, declined having a ſecond argument.

WILKINS and Another Aſſignees of CANN a Bankrupt againſt CASEY.

Tueſday, June 19th.

A factor gave his acceptance to his principal for the amount of goods ſold on account after a ſecret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; held that the payment was protected by the 1 Jac. 1 c. 15. ſ. 14.

THIS was an action for money had and received by the defendant for the uſe of the plaintiffs as aſſignees of *Thomas Cann* a bankrupt, as alſo for the uſe of *Cann* before he became a bankrupt; and alſo upon an account ſtated with the plaintiffs as ſuch aſſignees, and alſo with *Cann* before he became a bankrupt. The defendant pleaded the general iſſue. On the trial of the cauſe at the laſt aſſizes for *Glouceſter* before *Heath* J. a verdict was taken for the defendant, ſubject to the opinion of this court on a caſe reſerved. *Cann* was a clothier, and the defendant his factor in *London*, and their courſe of trade was this; *Cann* conſigned goods to the defendant which were ſold by him, and he received 5 per cent. commiſſion, taking on himſelf the riſk of the debts. Goods to the amount of 222 *l.* 18 *s.* had previous to the act of bankruptcy been

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been ſo conſigned to the defendant, and ſold by him; and he was indebted to *Cann* to that amount. On the 21ſt of *February* 1794 *Cann* committed an act of bankruptcy, on which the commiſſion iſſued, by leaving his dwelling-houſe at *Rodborough* in the county of *Glouceſter* to which he never returned. On the 22d of *February* he arrived in *London*, and on the ſame day called on the defendant at his houſe in the *Old 'Change*, and after informing him that he wanted to pay for a quantity of wool which he had bargained for in the country requeſted the defendant to furniſh him with bills for the amount of the goods ſo ſold by him as factor, and for which the defendant then ſtood indebted. The defendant thereupon accepted bills of exchange which *Cann* then drew payable to his own order at two, three, four, five, and ſix months after date, and indorſed in blank by him to the amount of 208 *l.* 12 *s.*, and alſo delivered to him one other bill dated 22d *February* 1794, drawn by the defendant and payable to one *Terry* for 14 *l.* 6 *s.*, making together the ſum of 222 *l.* 18 *s.* the whole balance due to *Cann* from the defendant, but for which no receipt or acknowledgment was given. Theſe bills were diſcharged by the defendant as they became due.

Dauncey for the plaintiffs. The payment by the defendant of *Cann*'s bills after knowledge of his bankruptcy was not protected by the 1 *Jac.* 1. *c.* 15. *ſ.* 14., which provides "that no debtor "of the bankrupt ſhall be endangered for the *payment* of his debt "truly and bonâ fide to any ſuch bankrupt before ſuch time as "he ſhall underſtand or know that he is become a bankrupt." Excluſive of the ſtatute ſuch a payment however fairly made after an act of bankruptcy would not have been protected. The act therefore furniſhes an exception in that particular caſe to the general rule of law; and the Court will not extend that exception by implication beyond the ſtrict meaning of the words in prejudice to the other creditors of the bankrupt. It is confined in terms to *payments* made without notice of the bankruptcy, and therefore does not extend to an *acceptance* of a bill, which is no payment but only an engagement to pay at ſome future time; and here the payment itſelf was made after the commiſſion iſſued. The bills were given payable at ſuch times as the defendant would have been liable to pay for the goods: the effect therefore of this tranſaction was to enable *Cann* to appropriate to his own uſe by anticipation ſo much of his property as would otherwiſe have devolved in the ordinary courſe of dealing to his creditors; while

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Caſey did not advance his own liability more than it was before. So far was this from a payment before notice of the bankruptcy that it was not even an obligation to pay at that time. If the defendant had received *Cann*'s acceptance payable after the bankruptcy, he could not have ſet it off againſt a debt due to the bankrupt's eſtate at the time; for the 5 *Geo.* 2. *c.* 30. *ſ.* 28. only provides that debts due *at any time before the act of bankruptcy* may be ſet off. Nor was this a debt which could have been proved under *Cann*'s commiſſion (ſuppoſing it to have been a voluntary acceptance) for the like reaſon; becauſe it was not a debt due at the time when the act of bankruptcy was committed. And however hard the eaſe may be, that is no anſwer to the demand at law.

Nolan, contrà, was ſtopped by the Court.

Lord KENYON C. J. This is as clear a caſe as can be ſtated. If we had an election given us for the firſt time to put either a rigid or a liberal conſtruction on the ſtatute of *James*, I ſhould not heſitate to ſay that we ought to put a liberal conſtruction upon it; for the object of it was to protect certain payments made to a bankrupt that common ſenſe and juſtice required ſhould be deemed valid payments, and in this inſtance to correct the rigour of the bankrupt laws. Now if the defendant had given other goods in exchange for theſe at the time, that would have been a payment to all intents and purpoſes, though not made in monies numbered. And it has always been holden that giving a bill of exchange is deemed a payment in ſatisfaction, provided the bill be paid when due.

The other Judges concurred.

Poſtea to the defendant.

DOE on the Demiſe of WILLIAM WYNDHAM *againſt* HALCOMBE.

Tueſday, June 19th.

Under a power of leaſing for one, two, or three lives, or for any term of yea s determinable on one, two, or three lives, ſuch lands as were then demiſed for any ſuch term, lands are not included which were then held under a demiſe " to *W.* and *G.* for ninety-nine " years, if *W.* and his widow and any eldeſt ſon living or in ventre ſa mere at the time of his (*W.*'s) " death, or if no ſon any eldeſt daughter then living or in ventre ſa mere, or any or either of thoſe " three viz. of the ſaid *W.*, and ſuch his wife ſon or daughter ſhould ſo long live, remainder to the " ſaid *G.* and his widow, ſon or daughter in the ſame manner;" of which deſcription of perſons five were in fact living at the time of the power reſerved, who were all entitled in ſucceſſion, three at a time, to come in under the leaſe—Under ſuch a general power, the three lives muſt be certain and coexiſting.

EJECTMENT for a meſſuage and land with the appurtenances in the pariſhes of *St. John the Baptiſt*, *St. John the Baptiſt* in *Devizes Rowd*, and *Biſhops Canning*, in the county of *Wilts*.

At

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Doe dem. Wyndham *againſt* Halcombe.

At the trial a ſpecial verdict was found ſtating in ſubſtance the following facts. Sir *Wadham Wyndham* Kt. one of the Judges of the Court of B. R. being ſeiſed in fee of certain eſtates in the counties of *Wilts*, *Dorſet*, and *Somerſet*, (whereof the premiſes in queſtion were part,) and having ſix ſons, *John*, *Hugh*, *William*, *Wadham*, *Thomas*, and *George*, on the 20th *December* 1667 demiſed the premiſes in queſtion by indenture between himſelf on the one part and his two ſons, *Wadham* then about five years old, and *George* then about one year old, on the other part, their executors &c. in conſideration of natural love and affection and for their better advancement; to hold the ſame unto the ſaid *Wadham* his executors &c. from the deceaſe of Sir *W. W. for the term of ninety-nine years, if the ſaid* Wadham *and any woman whom he ſhould marry and who ſhould be his wiſe at the time of his deceaſe and any ſon of his body lawfully begotten or to be begotten, which ſhould be his eldeſt ſon living or in ventre ſa mere at the time of his deceaſe, or if at that time he had no ſon born, nor in ventre ſa mere, then if any his eldeſt daughter ſhould be then living or in ventre ſa mere, or any or either of thoſe three, viz. of the ſaid* Wadham *and ſuch his wife and ſon if any, or daughter, if no ſon, at the time of his deceaſe ſhould ſo long live*, remainder to the ſaid *George*, for the term of ninety-nine years (in the like manner as was before limited with reſpect to *Wadham*,) yielding and paying during the ſaid term the yearly rent of twenty ſhillings; with a proviſo that Sir *Wadham* might revoke the ſaid term during his life. On 13th *December* 1668 Sir *Wadham* made his will, whereby he deviſed all his lands &c. (including the premiſes in queſtion), and all his leaſes and chattels and the uſes and truſts he had in any of them and all his perſonal eſtate to truſtees and their executors &c. to hold for twenty-one years unleſs his ſon *John* or ſome other of his ſons becoming his heir ſhould ſooner attain the age of twenty-five, in truſt to raiſe money to pay debts and legacies, the ſurplus to the uſe of ſuch heir when he ſhall attain twenty-five; remainder of the ſaid lands &c. (except what was afterwards otherwiſe diſpoſed of) to his ſon *John* for life, remainder to his firſt and other ſons ſucceſſively in tail male, with like remainders ſucceſſively to his ſons *Hugh*, *William*, *Wadham*, *Thomas*, and *George*, and their firſt and other ſons ſucceſſively in tail male; remainder to the ſaid truſtees, their executors &c. for ſuch term as might be ſufficient to raiſe 2000 *l.* more a piece for ſuch of his daughters as ſhould be living at ſuch time of failure of iſſue male, or in caſe any of the daughters be then dead leaving iſſue, then 1000 *l.* for each

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each iſſue then living; remainder to his brother *Hugh* for life, remainder to his firſt and other ſons ſucceſſively in tail male; remainder to his brother *Humphry* for life, remainder to his couſin *John Wyndham*, ſon of *Humphry*, and the heirs male of his body; remainder to his own right heirs; with a power for every perſon ſeiſed of an eſtate of freehold in poſſeſſion under the will to make leaſes not exceeding three lives or twenty-one years of things uſually demiſed under the old and accuſtomed rents or more, as tenants in tail might do under the 32 *H.* 8. Sir *Wadham* died ſeiſed 25th *December* 1668, not having revoked the leaſes, and leaving his ſix ſons, his eldeſt ſon *John* being then twenty-five years of age. His ſon *Wadham* entered into the demiſed premiſes by virtue of the indenture. *John Wyndham* the eldeſt ſon of Sir *Wadham* became ſeiſed of the eſtates deviſed to him for life; and on 1ſt *January* 1675 married *Alice Fownes*, and on 1ſt *January* 1676 had iſſue by her *John* the firſt ſon of his body, who afterwards came of age, and who on the 1ſt *January* 1714 married *Ann Barber*. By leaſe and releaſe of the 13th and 14th *January* 1714, in purſuance of the marriage articles between *John Wyndham* his ſon and *Ann Barber*, and for barring all eſtates-tail and the reverſions and remainders expectant thereon, *John Wyndham* the elder conveyed the reverſion of the premiſes in queſtion (among other eſtates) to truſtees in truſt for him *John Wyndham* the elder for life, remainder to *John Wyndham* the younger for life, remainder to truſtees to preſerve &c. remainder to the firſt and other ſons of the marriage in tail male ſucceſſively; remainder to the heirs male of the body of *John Wyndham* the younger; remainder to *Thomas Wyndham* brother to *John Wyndham* the younger in tail male; remainder to the heirs male of *John Wyndham* the elder; remainder to *William Wyndham* (brother of *John Wyndham* the elder) in tail male; remainder to *Wadham W.* another brother in tail male; remainder to *Thomas W.* ſon of *Thomas W.* another brother deceaſed in tail male; remainder to *Wadham W.* another ſon of the ſaid *Thomas W.* deceaſed in tail male; remainder to *George W.* another brother of the ſaid *John W.* the elder in tail male; remainder to the right heirs of *John Wyndham* the younger. In the laſt-mentioned indenture is contained a proviſo that "*John W.* the elder and *John W.* the younger during their lives and the heirs male of the body of *John W.* the younger lawfully to be begotten as they

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ſhould reſpectively come into actual poſſeſſion of the premiſes before limited, by any deed in writing under his or their hands and ſeals, for ſuch conſideration as ſhould ſeem meet to him or them, might make any leaſe or grant by copy of court-roll to any perſon or perſons for one two or three life or lives for any term or number of years determinable upon one two or three life or lives of ſuch part and parts and ſo much only of the ſaid manors meſſuages lands tenements hereditaments and premiſes as were then demiſed or granted for any ſuch term, *except the ſeveral meſſuages lands and premiſes which were demiſed by the ſaid Sir* Wadham *to the ſaid* William W. Wadham W. Thomas W. deceaſed and George W. his ſons lying in Breane the Devizes and Radipole aforeſaid and in Sock Manningford or elſewhere; and ſo as upon ſuch leaſe or grant there be reſerved payable yearly during the term ſo much rent as was then reſerved or paid." On 29th *February* 1723 *John W.* the elder died, on whoſe death *John W.* the younger became ſeiſed of the premiſes in the indentures of leaſe and releaſe mentioned, whereof the reverſion of the premiſes in queſtion are parcel. On 20th *April* 1726 the laſt-mentioned *John W.* ſuffered a recovery (*a*) of the ſame premiſes to the uſe of himſelf in fee. By indentures of leaſe and releaſe of the 12th and 13th *December* 1727 the ſaid *John W.* conveyed the ſame to truſtees in fee to the uſe of himſelf for life, remainder to truſtees to preſerve &c, remainder to his firſt and other ſons by *Ann* his wife ſucceſſively in tail male &c, remainder to the heirs male of his own body; with divers other remainders over to the males of the family of *Wyndham* in ſtrict ſettlement ſucceſſively, with an ultimate remainder to his (the (ſettlor's) own right heirs; with a power for "the ſaid *John Wyndham* and *Thomas W.* brother of the ſaid *John W.* during their lives and the heirs male of the body of the ſaid *John W.* and *Thomas W.* as they ſhall ſeverally and reſpectively be in the actual poſſeſſion of the ſaid manors lands &c. or any of them hereinbefore limited to him or them by any deed in writing under his and their hands and ſeals for ſuch fines or other conſiderations as to him or them ſhall ſeem meet to make any leaſes or grants by copy of court-roll to any perſon or perſons for one two or three life or lives or for

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(*a*) The recovery was ſtated in the ſpecial verdict at full length. When it came on for argument, Lord *Kenyon* aſked if it would not have been ſufficient to ſtate the legal effect of it; the counſel on both ſides anſwered that it had been their wiſh ſo to ſtate it, but upon a careful ſearch of all the former precedents of ſpecial verdicts no inſtance could be found in which a recovery was not ſet forth at length, and for that reaſon it was not thought prudent or ſafe to ſtate it otherwiſe in the preſent caſe.

any terms or number of years determinable upon one two or three lives in poſſeſſion reverſion or remainder of ſuch part and parts and ſo much only of the ſaid manors lands &c. as are now demiſed and granted for any ſuch time, ſo as upon ſuch leaſe or leaſes demiſes or grants there be reſerved payable yearly during the term &c. ſo much rent as is now reſerved or paid for the ſame or more or a proportionable part &c.;" with a power to *John W.* to revoke the uſes of the laſt-mentioned indenture and declare new uſes. *John W.* the younger had no iſſue male by *Ann Barber* but *Ann* his only child born the 14th *April* 1731. On 4th *February* 1745 he revoked by deed poll the uſes of the laſt-mentioned indenture by virtue of the power reſerved, and made an appointment to himſelf in fee. By indentures of leaſe and releaſe of the 6th and 7th *February* 1745 the ſaid *John W.* conveyed the ſame eſtates to truſtees to the uſe of himſelf for life, remainder to truſtees to preſerve &c, remainder to his firſt and other ſons ſucceſſively in tail-male, remainder to his daughter *Ann W.* for life, remainder to *William* ſon of *William W.* brother of the ſaid *John W.* deceaſed father of the ſaid *John W.* deceaſed in tail male, remainder to *Wadham W.* another ſon of *William W.* deceaſed in tail male, with divers remainders to other male branches of the *Wyndhams* in tail male, with remainder to his own right heirs. In which was contained the following power (on which the queſtion aroſe), *that the ſaid* John W. *party thereto and the ſaid* Ann W. *the daughter as they ſhould reſpectively be in poſſeſſion of the ſaid manors lands &c. limited to him and them reſpectively for life as aforeſaid by any deed in writing under his her or their hands and ſeals for ſuch fine or other conſiderations as to him her or them might ſeem meet to make any leaſe and grant by copy of court-roll to any perſon or perſons for one two or three lives, or for any term of years determinable upon one two or three lives in poſſeſſion reverſion or remainder of ſuch part and parts and ſo much only of the ſaid manors lands &c. as were then demiſed or granted for any ſuch time; ſo as upon ſuch leaſe or grant there be reſerved payable yearly during the term ſo much rent as was then reſerved or paid for the ſame or more, or a proportionable part &c. any thing contained to the contrary thereof in anywiſe notwithſtanding*; alſo to let any other part of the ſaid premiſes on rack-rent leaſes for twenty-one years or under. Before and at the time of the deed of 1714 and from thence until at and after the deed of 1745 divers parts of the premiſes ſettled were on leaſes for ninety-nine years determinable on three lives at the moſt, all the perſons for whoſe lives ſuch leaſes were made being alive at the time of granting the ſame, which were from time to time renewed until the death of *Ann W.* *Wadham W.* the leſſee the ſon of Sir *Wadham* married *Sarah Hurſt*, and had iſſue by her *Henry W.* born 12th *September* 1709, and died the 19th *February* 1736 leaving *Sarah* his widow and *Henry* his eldeſt ſon him ſurviving. *Sarah* died the 15th *April* 1758, and *Henry* died 6th *October* 1788. *George W.* (the other leſſee) another of the ſons of Sir *Wadham*, married *Katherine Aſhley*, by whom he had iſſue *Wadham W.* born 1ſt *January* 1700, and died in 1746, leaving *Katherine* his widow and *Wadham* his eldeſt ſon him ſurviving. *Katherine* died 4th *April* 1752, and *Wadham* died 22d *September* 1783. The premiſes in queſtion were held under the leaſe of 1667 till the death of the ſaid *Wadham W.* At the time of making the indentures of leaſe and releaſe of the 13th and 14th *January* 1714 till after the making of the indentures of the 6th and 7th *February* 1745 divers parts of the lands therein compriſed were held by leaſes for ninety-nine years determinable on three lives; other parts by the ſaid indenture granted by the ſaid Sir *Wadham*, and by ſimilar deeds to other of his younger children; and other parts by rack-rent leaſes; the relative value of each being four parts in ſeven during ſuch time held by leaſes for ninety-nine years determinable on three lives, two other parts by leaſes granted by Sir *Wadham* to his younger children, and the other remaining part by leaſes at rack-rent. *John W.* the ſettlor of 1745 died on 27th *December* 1750 leaving *Ann W.* his only child, and *Ann* became ſeiſed for life, remainder to *William W.* in tail male. The ſaid *William W.* died 29th *December* 1762 ſeiſed of ſuch remainder, which deſcended to *William W.* his ſon and heir; he died 12th *September* 1786, and the remainder of which he was ſo ſeiſed deſcended to *William W.* the leſſor of the plaintiff his eldeſt ſon in tail male. *Ann W.* on 1ſt *May* 1751 married *J. E. Arundel* whereby he became ſeiſed of the premiſes in right of his wife for her life; and being ſo ſeiſed on 6th *February* 1773 leaſed the premiſes in queſtion to *C. P.* by indenture executed by him and *Ann* his wife to hold the ſame for ninety-nine years if *J. E. Arundel* and *J. E. A.* his ſon ſhould ſo long live, to commence on the death of *Wadham W.* eldeſt ſon of *George* one of the ſons of Sir *Wadham*, reddendum to *J. E. Arundel* and *Ann* his wife and the perſon to whom the reverſion ſhould belong 20*s.* at *Lady-day* and *Michaelmas-day*, with a proviſo for re-entry if the rent were not paid and there were no ſufficient diſtreſs. On the death of *Wadham* the ſon of *George*, *C. P.* entered and was poſ-

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ſeſſed of the premiſes in queſtion. And on 27th *September* 1783 *J. E. A.* and *Ann* his wife leaſed the ſame premiſes to the ſaid *C. P.* for ninety-nine years if *Thomas Raymond Arundel* their ſon ſhould ſo long live, to commence from the deaths of the ſaid *J. E. A.* the father and *J. E. A.* the ſon, with the ſame reddendum as laſt mentioned. *J. E. A.* the father and *J. E. A.* and *T. R. A.* the ſons are living. *Ann Arundel* died 6th *April* 1796; on whoſe death the leſſor of the plaintiff as heir male of the body of *William W.* (his father and grandfather being dead) became ſeiſed of the premiſes and demiſed the ſame to the plaintiff, who entered and was ouſted &c.

Lens for the leſſor of the plaintiff. The queſtion is whether that part of the eſtate compriſed in the leaſe granted by Sir *Wadham W.* in 1667 to his younger children is within the leaſing power of the deed of 1745. Nothing will turn upon the nature or deſcription of the property, as there is ſufficient of every kind to anſwer the deſcription of it in that ſettlement without neceſſarily including the premiſes in queſtion. The power of leaſing reſerved by the deed of 1745 is that the ſettlor and *Ann* his daughter might have *a power* reſpectively, as they were in poſſeſſion of the eſtate, to leaſe *for one two or three lives, or for any term of years determinable upon one two or three lives, in poſſeſſion reverſion or remainder, ſuch part and parts and ſo much only of the ſaid lands &c. as were then demiſed for any ſuch time;* ſo as there be reſerved the ſame yearly rent &c. At that time the premiſes in queſtion were out upon leaſe granted by Sir *Wadham* in 1667 to his younger children; and it therefore becomes material to conſider the operation of that leaſe, whether it comes within the deſcription of the power reſerved in 1745, i. e. whether that can be called a leaſe *for one two or three lives, or for any term of years determinable on one two or three lives &c.* Firſt, it is obſervable that the intereſt thereby granted was for the advancement of children, and was revocable by the grantor, and therefore does not fall within the common meaning of the word leaſe. Next, it was granted for more than three lives; for it was at that time held during the lives of *Sarah* the widow of *Wadham W.*, *Henry* his ſon, and *George* the ſon of Sir *Wadham;* beſides which there were then two other lives which were entitled to come in under the leaſe, viz. *Katherine* the widow of *George* (in caſe ſhe ſurvived her huſband) and *Wadham* his ſon. When *George* died the year following there were ſtill four lives ſubſiſting upon which

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the eſtate was in fact held; namely, the two widows and the two ſons of the firſt grantees. Beſides which, at the time of the ſettlement in 1745 there was a poſſibility that *George* might have been left a widower, and might have married again and had other children, and all theſe might alſo have come in under the leaſe. It could not therefore be ſaid that the eſtate was holden upon any definite number of lives, and certainly was not confined to three lives at the time. Neither was it confined to co-exiſting lives; in which reſpect alſo it differs from leaſes for one two or three lives generally ſo called. Leaſes of that deſcription are always taken to mean leaſes for three certain lives in being, which are conſequently running out at the ſame time, and are conſidered as equivalent in point of intereſt to leaſes for twenty-one years abſolute; and this is a common mode of leaſing in ſome parts of the kingdom, particularly in the Weſt, where this eſtate lies. In *Snow* v. *Cutler* (*a*) it was ſaid by Sir *Wadham Wyndham* Juſtice himſelf, that under a power to leaſe for one two three lives the grantee could not make a leaſe for the life of a perſon not then in eſſe. It is further obſervable that the power of leaſing reſerved to *Ann Wyndham* the daughter of the ſettlor was not confined to perſons of her own family, but ſhe might have granted this eſtate, if at all, for the life of a ſtranger, which could not have been the intent of the ſettlor, whoſe partiality for the male branches of his family was ſo ſtrong as to induce him to diſinherit the iſſue of his only daughter.

Dampier contrà.—It is material to conſider the ſituation of the family at the different periods when the ſeveral ſettlements were made, in order to ſhew the meaning of the ſettlor in reſerving the power of leaſing in the deed of 1745. The ſettlement of 1714 was made upon the marriage of *John Wyndham* the younger and in contemplation of his having male iſſue. There the power of leaſing was granted in the ſame terms as in the deed of 1745, and it was neceſſary to make an expreſs exception out of that power of the lands in queſtion which had been demiſed by Sir *Wadham*; which ſhews that the parties, one of whom *John Wyndham* the younger was the ſettlor in the deed of 1745, conſidered that the power of leaſing would have extended over thoſe lands if they had not been particularly excepted. At the time of the ſettlement of 1745 the ſituation of the family was materially altered. *John Wyndham* was then near 70 years old, having only one daughter and no probability of any other children. And though it muſt be

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(*a*) Sir *T. Ray*. 163.

preſumed

preſumed that he had a ſtrong partiality for the male line of his family by giving them the bulk of his eſtate, yet it may as fairly be preſumed that he conſidered his daughter's children in the light of younger children of the family; and therefore it was natural that he ſhould enable her to make the ſame proviſion for them as had been before made for younger children by Sir *Wadham*. Accordingly the power of leaſing is given to his daughter in the ſame terms as is contained in the ſettlement of 1714, but omitting the exception of the lands demiſed by Sir *Wadham*. This difference in the two ſettlements, ariſing out of the different ſituations of his family at the reſpective times, is the ſtrongeſt indication that he intended to give his daughter the power of leaſing the premiſes in queſtion. Then the words of the power are ſufficient to carry that intent into effect. It is not confined to lands which had been uſually demiſed, but to all lands which were *then demiſed or granted for one two or three lives or for 99 years determinable on one two or three lives*. This deſcription does in terms include the lands in queſtion; for they were demiſed for 99 years determinable on lives never exceeding three at one and the ſame time though not concurrent. The caſe of *Snow* v. *Cutler* (*a*) only ſhews that Mrs. *Ann Arundel* had not the power of granting ſuch a leaſe as Sir *Wadham* had done: but it is not neceſſary to contend that ſhe had; for Sir *Wadham* being ſeiſed in fee had the power of diſpoſing of the whole: it is ſufficient for this purpoſe that ſhe had the power of leaſing for three co-exiſting lives.

Lens in reply.—No ſtreſs ought to be laid upon the omiſſion of the exception in the power of leaſing granted by the deed of 1745, which was unneceſſarily inſerted in that of 1714. If parties in one inſtrument declare that which was not neceſſary to be declared, the omiſſion of it in another where it was equally unneceſſary cannot furniſh any inference of a change of intent: for if that were really the caſe, it would be more natural and eaſy to declare ſuch change of intent in plain words. Beſides, no fair argument of intent can be drawn from the change of language in two different inſtruments having no reference to each other, though made between ſome of the ſame parties. The former deed is not even evidence of the intention of the parties to the deed of 1745. As to the alteration in the ſituation of the family requiring a different arrangement of the property, that was ſufficiently provided for by giving Mrs. *Ann Arundel* an eſtate for life which ſhe would not have taken

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(*a*) Sir *T. Ray*. 163.

under

under the former ſettlement. But this very ſettlement, whereby only an eſtate for life is limited to his only child, ſhews the ſettlor's preference for the male over the female branch of his family. Neither does the power of leaſing in the deed of 1745 extend over this eſtate in the terms of it: the leaſe of it granted by Sir *Wadham* was not in effect a leaſe for three lives; for at the time it could only be determinable on the failure of five and afterwards of four lives. And the defendant's argument cannot ſtop ſhort of maintaining that if the lands in queſtion were within the leaſing power granted to Mrs. *Ann Arundel* ſhe might have granted ſuch another leaſe as Sir *Wadham* had before done; becauſe unleſs the leaſe granted by Sir *Wadham* can be deemed "a leaſe for 99 years "determinable upon one two or three lives," there can be no pretence for the defendant's claim at all: and if it can, then a leaſe granted in the ſame terms would be within that power. Unleſs therefore the argument can be carried to the full extent, it muſt fail altogether.

Lord Kenyon Ch. J. I think that the defendant's counſel is driven to ſupport by argument that Mrs. *Arundel* had power to make the ſame kind of leaſe that Sir *W. Wyndham* granted for the benefit of his children, otherwiſe judgment muſt be given for the plaintiff. In family ſettlements, ſuch as that made in 1745, it is uſual to give a power of leaſing upon lives ſuch parts of the eſtate as are held on lives, and to grant leaſes at rack-rent of ſuch parts as are let at rack-rent. Perhaps the power of leaſing inſerted in the deed of 1745 was ſuggeſted by the conveyancer, who in all probability did not know that Sir *W. Wyndham* had in the laſt century demiſed part of this eſtate in the manner ſtated in the ſpecial verdict. The execution of the power by Mrs. *Arundel* muſt depend altogether on the power given in the deed of 1745; the intention of the parties in that deed cannot be collected from the contents of the deed made in 1714. By the deed of 1745 ſhe had the power to leaſe "for one two or three lives or for any term of years determinable upon one two or three lives, ſuch parts of the eſtate as were then demiſed *for any ſuch time*," that is, for one two or three lives or for any term of years determinable on one two or three lives. The leaſe to the defendant having been granted by Mrs. *Arundel* of ſuch parts of the eſtate as were compriſed in the proviſion made by Sir *W. Wyndham* for his children, the queſtion comes to this, whether the leaſe granted by Sir *W. Wyndham* were for one two or three lives or for any term depending on one two or three lives. Now what is meant by a leaſe determinable on one two or three lives? The lives muſt be concurrent; the candles muſt be all burning at the ſame time. But that was not the caſe with reſpect to the leaſe granted by Sir *W. Wyndham*; for that was determinable on the lives of his ſon *Wadham*, any widow left by that ſon, his eldeſt ſon or eldeſt daughter, and alſo on the lives of his own ſon *George*, and of his widow, and eldeſt ſon or daughter. That certainly was not a leaſe determinable on one two or three lives; for when one died, another was to ſpring up in his room; ſo that there might have been twelve lives on which the leaſe was to determine. If this were a leaſe depending on one two or three lives, they would be capable of deſignation: I would then aſk what are the lives? But they were not then known, or in eſſe. I am therefore clearly of opinion that the power of leaſing given to Mrs. *Arundel* in the deed of 1745 was a power adapted to the ordinary courſe of ſettlements, and did not enable her to demiſe the lands leaſed by Sir *W. Wyndham* in 1677 to his children, which were not leaſed for one two or three lives or for any number of years determinable on one two or three lives, but for a longer duration for ſeveral lives.

Ashhurst J. declared himſelf of the ſame opinion.

Grose J. The leaſe made by Sir *W. Wyndham* was a proviſion not only for two of his ſons but alſo for their widows and their eldeſt ſons or eldeſt daughters. But the power of leaſing given in the deed of 1745 was only meant to extend to leaſes ſuch as are uſually granted in the weſt of *England* for three lives, where all the lives are certain and co-exiſting. The old leaſe in 1677 was rather in the nature of a family ſettlement than of a leaſe in the common acceptation of the word.

Lawrence J. of the ſame opinion.

Judgment for the plaintiff.

1798.

Wedneſday June 20th.

The KING *againſt* F. CALVART.

The foot-guards may be billeted all over the kingdom as well as the other troops.

THIS was a conviction under the mutiny act (*a*) againſt the defendant, a livery ſtable keeper in the pariſh of *St. Pancras* in the county of *Middleſex*, for refuſing to receive and provide the neceſſaries mentioned in the act of parliament for *W. Windmill* a ſoldier in the firſt regiment of foot-guards, who had been quartered and billeted upon him. The defendant, before the magiſtrate who convicted him, admitted his refuſal &c. but contended that he was not bound by law to receive or victual *Windmill*, becauſe he alleged and offered to prove that certain other *pariſhes* lay between the pariſh of *St. Pancras* and the city and liberties of *Weſtminſter*, and that no part of the pariſh of *St. Pancras* is contiguous or adjoining to the city or liberties of *Weſtminſter:* but the magiſtrate, thinking that the defence was no juſtification to the defendant, convicted him in 40*s*.

Abbott in ſupport of the conviction (*b*). The 31ſt ſection of the act gives a general power to conſtables &c. of quartering the army in inns livery ſtables ale-houſes &c. in any part of *England*. If

the

(*a*) The 37 *Geo*. 3. *c*. 33. *ſ*. 31. (after reciting that it was declared by the petition of rights "that the people of the land are not by the laws to be burdened with the ſojourning of ſoldiers againſt their wills," but that at this time and during the continuance of the act "there is and may be occaſion for the marching and quartering of regiments troops and companies in ſeveral parts of this kingdom") enacts that it ſhall be lawful to and for the conſtables tithingmen headboroughs and other chief officers and magiſtrates of cities towns and villages and other places within *England* &c. and in their default or abſence for any one juſtice of the peace to quarter and billet the officers and ſoldiers in his Majeſty's ſervice in inns livery ſtables alehouſes &c. &c. The 33d *ſect*. enacts that "it ſhall be lawful for the high conſtables petty conſtables headboroughs and tithingmen within the city and liberties of *Weſtminſter and places adjacent* to billet and quarter the officers and ſoldiers of his Majeſty's regiments of foot-guards in ſuch houſes only as by this act are limited in and about the ſaid city and liberties of *Weſtminſter* and places adjacent (except the city of *London*); and when any order ſhall iſſue for the quartering or billeting of any officers or ſoldiers within the ſaid city and liberties of *Weſtminſter* and places adjacent the high conſtable ſhall deliver out precepts to the ſeveral petty conſtables headboroughs or tithingmen of each pariſh ward hamlet and diſtrict within their reſpective diviſions to billet and quarter ſuch officers and ſoldiers of his Majeſty's regiments of foot-guards on ſuch houſes only as by the act is limited within his reſpective pariſh hamlet or diſtrict &c. By *ſect*. 40. it is enacted that if any victualler or any other perſon liable to have any officer or ſoldier billeted or quartered upon him ſhall refuſe to receive or victual ſuch officer or ſoldier ſo quartered upon him, or ſhall refuſe to furniſh or allow according to the act the ſeveral things thereinafter directed &c. and ſhall be thereof convicted before one or more juſtices of the peace &c. he ſhall forfeit a ſum of money not exceeding 5 *l*. nor leſs than 40*s*.

(*b*) It was agreed that no objection ſhould be taken to the form of the conviction.

the act had ſtopped there, no doubt the guards might have been quartered on the defendant. The 33d ſection, which provides particularly for the billeting of the guards, was not intended to reſtrain the former proviſion, but merely to regulate the quartering of them in and about *Weſtminſter*, by placing it under the control of the high conſtable of the city and liberties. For this purpoſe it gives authority to the high conſtables petty conſtables headboroughs and tithingmen within the city and liberties of *Weſtminſter* and *places adjacent* to billet &c. The 34th ſection uſes the term *parts adjacent* as ſynonimous. There is nothing in the general intent nor in the wording of the act to limit the meaning of the words *places or parts adjacent* to the *pariſhes* contiguous or *adjoining* to the city or liberties of *Weſtminſter*, as contended for by the defendant. The defendant's plea ſhould have gone farther and ſtated that *St. Pancras* was not part of any *place* adjacent to *Weſtminſter*; for "place" in this act of parliament has a larger ſignification than *pariſh*. The officers, to whom the duty is committed, are ſuch as have more extenſive juriſdiction than parochial officers. The firſt named are high conſtables in the plural number, which, as *Weſtminſter* has only one high conſtable, muſt be intended of the high conſtables of the adjacent hundreds. Then the 33d clauſe goes on to except the city of *London* generally, which was nugatory if by *places adjacent* pariſhes only were intended; for moſt of the pariſhes in the city of *London* are not contiguous to the city or liberties of *Weſtminſter*. It ſhews therefore the meaning of the Legiſlature that without this general exception the whole of the city of *London* might have been included under the deſcription of *places adjacent*. He alſo referred to *Jones* v *Walker*, *Cowper* 624.

H. Blackſtone contrà. The 31ſt ſection, however it might have included the guards if no further proviſion had been made, is yet reſtrained in that reſpect by the particular proviſion made for quartering them in the 33d ſection. The words "places adjacent" in that clauſe muſt be taken to mean *places contiguous or adjoining to*, otherwiſe there can be no limit to the ſenſe of them; and if they be ſo reſtrained there is no legal diviſion ſo applicable as pariſhes, which is the largeſt deſcription made uſe of in the ſubſequent part of the ſame clauſe, where the high conſtable is directed to iſſue his precepts to the petty conſtables &c. It would have been abſurd to have mentioned pariſhes and hamlets, if *places* meant a larger deſcription; and here it appears that the

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pariſh of *St. Pancras* does not adjoin the city or liberties of *Weſtminſter*. Whether one diſtrict be adjacent or adjoining to another is a matter of fact, and ſuch a deſcription cannot be ſatisfied unleſs there be an immediate contiguity: *per Gould* Juſtice in *Rouſe* v. *Bardin*, 1 *H. Blac.* 354. So in pleading abuttals in treſpaſs, if one cloſe were laid to be adjacent to another, the plea would not be ſuſtained by ſhewing it was next but one.

Lord Kenyon Ch. J. I have no doubt what was the meaning of the Legiſlature in this act of parliament, though perhaps it is not ſo accurately penned as it might have been. I cannot but think that the inquiry, which has been made into the preciſe meaning of the word *adjacent*, is wholly immaterial. By the 31ſt ſection all the army, including the guards as well as other troops, were to be quartered in the manner there mentioned: and there is nothing in the ſubſequent part of the act which confines the quartering of the guards to the city or liberties of *Weſtminſter* or any other particular places. But the reſult of it is that if they be quartered in *Weſtminſter* and the places adjacent they ſhall be quartered in ſuch houſes only as by the act is limited, of which deſcription the defendant's houſe is one. The general view of the act was to preſerve as much as was poſſible from the nature of the thing the control of the civil over the military power; and therefore it committed the quartering of troops to the regulation and government of civil officers, amongſt others it names the high conſtables, whoſe juriſdiction it is well known extends over the whole hundred.

Ashhurst J. declared himſelf of the ſame opinion.

Grose J. The 33d clauſe only preſcribes the manner in which the billeting is to be made. If the guards are quartered in the city or liberties of *Weſtminſter* and places adjacent, the billeting is to be made in the particular manner there deſcribed. If they are quartered elſewhere, the billeting is to be according to the manner preſcribed by the general clauſe.

Lawrence J. of the ſame opinion.

Conviction affirmed.

Lee Compere *againſt* Hicks and Another.

See before Doe v. Hicks 437.

Friday, June 22d.

An actual entry is neceſſary to avoid a fine; and the party ſo avoiding it cannot lay his demiſe in an ejectment or recover the meſne profits that accrued before ſuch entry.

If a declaration in treſpaſs contain two counts, and the defendant plead to one and ſuffer judgment by default on another, and on the trial of the firſt the plaintiff only prove one act of treſpaſs which is covered by the ſecond count, he is not entitled to a verdict on the firſt count.

This was an action of treſpaſs for meſne profits. The firſt count in the declaration ſtated the entry and expulſion on the 25th of *March* 1794; the ſecond was exactly ſimilar to the firſt, except that it ſtated the entry and expulſion on the 3d of *June* 1797.

To the firſt count the defendant pleaded the general iſſue; on the ſecond he ſuffered judgment to go by default. The venire was awarded as well to try the iſſue joined on the firſt count as to aſſeſs damages on the laſt.

On the trial before *Heath* J. at the laſt aſſizes at *Glouceſter*, the jury found the value of the meſne profits from the 25th of *March* 1794 to the 2d of *June* 1797 to be 1025*l.* 15*s.*, and the value of the meſne profits from the 2d of *June* to the 30th of *January* 1798 to be 212*l.* 2*s.*, and the coſts of the writ of poſſeſſion 8*l.* 12*s.* And a ſpecial caſe was reſerved for the opinion of this Court.

Thomas Compere the younger being by virtue of a ſettlement made in the year 1715 ſeiſed of the premiſes mentioned in the declaration for his life, with remainder to his firſt and other ſons in tail male, remainder to his brother *Anthony Compere* for life, remainder to his firſt and other ſons in tail male, remainder to the heirs of the body of the ſaid *Thomas Compere*, remainder to the heirs general of the ſaid *Thomas Compere*, on the 24th *July* 1737 made his will of this date and thereby deviſed the ſame (with other eſtates of which he was ſeiſed in fee) on failure of iſſue of his body unto his father *Anthony Compere* for life, remainder to his brother *Anthony Compere* for life, remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of his body ſucceſſively in tail male, with divers remainders for life, and in tail, that never took effect and are not neceſſary to be noted in this caſe; remainder to the firſt ſon of the body of his couſin *Thomas Compere* late of *Market Harbro'* deceaſed for life; remainder to the ſaid truſtees and their heirs in manner aforeſaid; remainder to the firſt and other ſons of his body in tail male in manner aforeſaid; remainder to the ſecond ſon of the body of the ſaid *Thomas Compere* deceaſed for life, remainder to the ſaid truſtees and their heirs in manner aforeſaid; remainder to the firſt and other ſons of his body ſucceſſively in tail male; remainder to his

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own right heirs for ever. The teſtator *Thomas Compere* the younger died without iſſue on the 5th of *May* 1739. And upon his death his brother *Anthony Compere* entered into poſſeſſion of the ſaid premiſes and continued in poſſeſſion thereof until his death on the 11th of *October* 1764. By indentures of leaſe and releaſe of the 10th and 11th of *March* 1739-40, the releaſe made between the ſaid *Anthony Compere* (teſtator's brother) and *Charles Bliſſett* of the one part and *George Haſlam* of the other part, in conſideration of 260*l.* to the ſaid *Charles Bliſſett* by the ſaid *George Haſlam* paid (which ſaid ſum of 260*l.* was thereby declared to be the proper money of the ſaid *Anthony Compere*) and of 5*s.* to the ſaid *Anthony Compere*, they the ſaid *Charles Bliſſett* and *Anthony Compere* did grant bargain ſell alien remiſe releaſe and confirm unto the ſaid *George Haſlam* and to his heirs the ſaid premiſes, to hold to the ſaid *George Haſlam* his heirs and aſſigns for ever, in truſt nevertheleſs to the only proper uſe and behoof of the ſaid *Anthony Compere* his heirs and aſſigns for ever; with a covenant from the ſaid *Charles Bliſſett* and *Anthony Compere* to levy a fine ſur conuſance de droit come ceo &c., the uſe of which was thereby declared to enure to the ſaid *Anthony Compere* his heirs and aſſigns for ever. In the *Michaelmas* Term 14 *Geo.* 2. a fine was levied accordingly of the ſaid premiſes with proclamations between the ſaid *George Haſlam* plaintiff and the ſaid *Anthony Compere* and *Charles Bliſſett* deforciants. *Anthony Compere* father of the ſaid *Thomas Compere* the younger died 24th *May* 1743. By indenture of the 5th of *March* 1760 *Anthony Compere* of *Market Harbro'* firſt ſon of the ſaid *Thomas Compere* late of *Market Harbro'* deceaſed and a deviſee named in the ſaid will of *Thomas Compere* the younger in conſideration of 500*l.* to him then paid by the ſaid *Anthony Compere* the brother, and of an annuity of 20*l.* to be paid to him when the ſaid eſtates ſhould fall into poſſeſſion of the aſſigns of the ſaid *Anthony Compere* the brother, did grant bargain and ſell his eſtate for life in remainder in the ſaid premiſes (inter alia) unto the ſaid *Anthony Compere* the brother his heirs and aſſigns. The ſaid *Anthony Compere* the brother by his will of the 28th of *July* 1760 deviſed the ſame premiſes (inter alia) to truſtees and their heirs, in truſt to permit his grand-nephew *Thomas Blizard* to take the rents and profits during his natural life, remainder in truſt to permit his niece *Mary Compere* now the defendant *Mary Hicks* to take the rents during her life, with remainders over. The ſaid *Anthony Compere* the brother died a bachelor the 11th of *October* 1764 without revoking or altering his ſaid will. The ſaid *Thomas Blizard* having attained twenty-one entered into poſſeſſion of the ſaid premiſes deviſed by the will of *Anthony Compere*, and continued therein until the 28th day of *Auguſt* 1784, when he died a bachelor. Upon the death of the ſaid *Thomas Blizard* the ſaid defendant *Mary Hicks* (formerly *Mary Compere*) entered into poſſeſſion of the ſaid premiſes. The ſaid *Anthony Compere* of *Market Harbro'* died the 19th of *March* 1794, leaving the plaintiff *Lee Compere* his eldeſt ſon. On the 2d of *June* 1797 the plaintiff *Lee Compere* made an actual entry into the premiſes for the purpoſe of avoiding the fine levied by the ſaid *Anthony Compere* the brother in *Michaelmas* Term 14th *George* 2d, and immediately afterwards brought an ejectment in the Court of King's Bench for recovery thereof, in which the ſaid *Mary Hicks* and her tenant *William Rogers* were defendants; the declaration in the action of ejectment contained two counts, in one of which the demiſe was laid on the 3d of *June* 1797, and in the other on the 25th day of *March* 1794. The ejectment was tried at the aſſizes held at *Glouceſter* in the ſummer 1797, when a verdict was given for the plaintiff generally, which afterwards by direction of the Court (*a*) was entered on that count only in which the demiſe was laid on the 3d of *June* 1797; final judgment was ſigned and a writ of poſſeſſion executed. Whereupon this action was brought for the recovery of the meſne profits. The queſtions intended to be ſubmitted to the Court are; firſt, whether the fine levied by *Anthony Compere* had any operation? If it had, ſecondly, whether the plaintiff having made an actual entry to avoid the fine is not entitled to the meſne profits before the actual entry made by him? and ſuppoſing him not to be ſo entitled, then, thirdly, whether the value of the meſne profits from the 2d day of *June* 1797 and the coſts of the writ of poſſeſſion or either of them can be recovered on the firſt count of the declaration to which the defendants pleaded not guilty, or ought to be aſſeſſed as damages on the laſt count upon which judgment was ſuffered by default? The verdict is to be entered up on the facts ſtated in ſuch manner as the Court ſhall think the plaintiff might have entered it up on the trial.

It was admitted that the fine levied by *Anthony Compere* was not void, and that it was neceſſary for *Lee Compere* to make an actual entry to avoid it.

(*a*) Vid. *Doe d. Compere* v. *Hicks*, *ſup.* 433.

Leyceſter for the plaintiff. Firſt; the plaintiff is entitled to the meſne profits for the whole time ever ſince his title accrued. Suppoſing there had been no fine in this caſe, the defendant who continued in poſſeſſion ſubſequent to the time when the plaintiff's title accrued (which was on the death of *Anthony Compere* of *M. H.*) would have been a tenant at ſufferance; and though the plaintiff until entry could not have maintained treſpaſs, yet when he had made an entry he might have brought either treſpaſs or ejectment, and after the writ of poſſeſſion executed or after a confeſſion of leaſe entry and ouſter he might have recovered the meſne profits from the time when his title firſt accrued. Then the circumſtance of the fine having been levied in this caſe cannot make any difference; for though an actual entry was neceſſary in order to avoid it, when that entry was made, which has the ſame effect as the confeſſion of leaſe entry and ouſter, it has relation back to the time when the title accrued. [*Per Curiam.* Confeſſion of leaſe entry and ouſter will not enable the party to recover the meſne profits: the plaintiff muſt have a writ of poſſeſſion; and then the entry under the writ will be referred to the time of the title. *Aſlin* v. *Parkin*, 2 *Burr.* 665.] But by whatever means the entry is made, when it is made the party may recover the meſne profits from the time when the title firſt accrued. A fine does not take away any right or convey any right; it is ſimply an acknowledgment by the conuſor that he has conveyed his eſtate to ſome perſon. The ſtat. 4 *Hen.* 7. *c.* 24., after enacting that fines ſhall conclude ſtrangers as well as parties and privies, adds a ſaving clauſe to every perſon and perſons and their heirs, other than the parties in the fine, of their right title claim and intereſt &c; "ſo that they purſue their title claim or intereſt &c by way of action or lawful entry within five years next after the ſaid proclamations &c." This therefore is a condition on which the right to a party is reſerved, and when the condition is performed it has the ſame effect as if no fine at all had been levied. If it be ſaid that a plaintiff in ſuch a caſe ought not to recover the meſne profits that accrued before the entry made to avoid the fine on the ground of laches in the plaintiff, it may be anſwered that there are many caſes in which no laches can be imputed to the party, of whoſe intereſt a fine has been levied, for not making an entry immediately after the fine, *e. g.* thoſe of femes coverts and infants. And though in *Berrington* v. *Parkhurſt* (*a*) it

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(*a*) 2 *Str.* 1086. and *Andr.* 125.

was holden that the leſſor of the plaintiff who was obliged to make an actual entry in order to avoid a fine could not recover in ejectment on a demiſe laid before the entry, there is no reaſon why a plaintiff ſhould not recover the meſne profits before the entry. And a court of equity will decree the plaintiff the whole of the meſne profits from the time when his title accrued. *Dormer* v. *Forteſcue*, 3 *Atk.* 124. Beſides on the words of the ſtat. 6 *An. c.* 19. *ſ.* 5. the plaintiff may recover the whole. That ſtatute enacts that every perſon, who as guardian or truſtee for any infant &c. and every other perſon having any eſtate determinable upon any life, who after the determination of ſuch particular eſtate or intereſt without the conſent of the next in remainder ſhall hold over and continue in poſſeſſion of any lands &c, ſhall be adjudged to be treſpaſſors, and the perſon who ſhall be entitled to ſuch lands &c ſhall and may recover in damages againſt the perſon ſo holding over "the full value of the profits received during ſuch wrongful poſſeſſion." But, ſecondly, even if the plaintiff be not entitled to the meſne profits for the whole time but only to thoſe that have accrued ſince his entry, he may recover them under the firſt count of the declaration. The plaintiff has his election on which count he will take his damages, and may now elect to enter up a verdict on the firſt count.

Abbott, for the defendant, was deſired by the Court to confine himſelf to the laſt queſtion.—The plaintiff is not now entitled to enter up a verdict on the firſt count, inaſmuch as there was only one treſpaſs proved, and as he may recover on the ſecond count whatever damages he is entitled to. Two counts were added in this caſe for the purpoſe of giving the plaintiff an opportunity of trying the principal queſtion at the defendant's expence. Either of the counts will cover the whole of the plaintiff's demand; and if there had been only one the defendant would have ſuffered judgment by default on that one and diſputed the quantum on executing the writ of enquiry. Where a declaration in treſpaſs contains two counts and only one act of treſpaſs is proved, the plaintiff is only entitled to a verdict on one: Per *Buller* J. in *Taylor* v. *Cole* (*a*). Here the plaintiff alleged two diſtinct acts of treſpaſs, each capable of being proved; and on the proof of either the plaintiff was entitled to a verdict on one, and on proof of both to a verdict on both: the defendant, con-

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(*a*) *Ante*, 3 vol. 296.

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ſcious that he had committed one treſpaſs, admitted it by ſuffering judgment to go by default; to the other he pleaded not guilty, and the plaintiff by carrying the record down to trial, undertook to prove that the defendant had committed another and a different treſpaſs from that confeſſed by the defendant: but in this he failed, and therefore the defendant is entitled to a verdict on the firſt count. As therefore the plaintiff for his own advantage added a ſecond count, the expence of the trial ought to be borne by him; and in truth this is merely a queſtion reſpecting the coſts.

See my opinions in this very case on same point 6. & 12. Feb. 1798. They were as the case is here decided. Mr. Abbot was of the same opinion. But Mr. Serjt. Williams doubted on a distinction of trespass from ejectment, & tho' I dissented from him, I was struck with the opinion as a very able one. A.H.

See Andr. 134

Lord KENYON Ch. J. On the principal queſtion in this caſe I have no doubt. It was decided (whether rightly ſo or not I will not now enquire) early in this century, in 1703, by all the Judges except Mr. Baron *Price* that there muſt be an actual entry to avoid a fine, and that an ejectment cannot be brought until ſuch entry has been made; and under the *Stat.* 4 & 5 *An. c.* 16. *ſ.* 16. the action muſt be brought within a year after the entry is made. Now an action of treſpaſs ſtands preciſely on the ſame footing as an ejectment for this purpoſe; and the plaintiff could not treat the defendant as a treſpaſſer until he had himſelf made an entry on the land. It is ſaid however that it is unreaſonable that the plaintiff ſhould loſe the rents and profits of this eſtate in the interval between the time when his right accrued and the ſubſequent entry; and it has been contended that, becauſe a court of equity would give relief in ſuch a caſe, the plaintiff is entitled to the ſame relief in a court of law: but that concluſion by no means follows. There is a caſe in the books, in which the tenant for life having cut down timber and died Lord Chancellor *Cowper* decreed relief againſt his executors in favour of the remainder man, and yet the latter could not (*a*) have maintained an action at law againſt the executors of the tenant for life, for actio perſonalis moritur cum perſonâ. We cannot conſider whether or not a court of equity would give relief in ſuch a caſe as this: it is ſufficient for us ſitting in a court of law to ſay that the defendant was in ſuch a ſituation that the fine protected him not only from an ejectment but from every action of treſpaſs until the entry was made to avoid the fine. In the caſe of *Berrington* v. *Parkhurſt*, as reported in Andrews (*b*), Lord *Hardwicke* ſaid that in the caſe of a fine the party has no title before an entry, not on account of the *Stat. Hen.* 7. but on account of the puiſſance of

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(*a*) But ſee 3 *Atk.* 757.

(*b*) *Andr.* 136.

COMPERE *againſt* HICKS.

a fine at common law. It has been properly ſaid that this fine did not work a diſcontinuance; and ſo it was holden in *Stephens* v. *Britridge*, 1 *Lev.* 36. But a fine has a certain operation (which I will not attempt to deſcribe, nor diſcuſs the queſtion reſpecting the difference between a diſcontinuance and deveſting of the eſtate) which in the opinion of all the Judges (except Mr. B. *Price*) makes it neceſſary that an actual entry ſhould be made to avoid it. With reſpect to the other point; as there was a judgment by default on one count, on which the plaintiff might have recovered all that he is entitled to, he ought in reaſon to bear the fruitleſs expence of the trial on the firſt count. The damages therefore muſt be aſſeſſed on the ſecond count, and the plaintiff muſt pay the coſts of the trial that have been unneceſſarily incurred.

Ashhurst J. It is a point very well ſettled that an actual entry is neceſſary to avoid a fine; but the party cannot be ſaid to have been in poſſeſſion before he makes ſuch entry. Then the plaintiff not having been in poſſeſſion before entry, he cannot recover the meſne profits that accrued before.

Grose J. and **Lawrence** J. agreed on both points.

Per Curiam; Verdict to be entered up for the defendant on the firſt count; and damages to be entered up on the ſecond count for 220 *l.* 14 *s.*

HAUSSOULLIER *againſt* HARTSINCK and others.

Friday, June 22d.

A note, by which *A.* promiſes to pay to the bearer 50*l.* "being the portion of a value as under depoſited in ſecurity for the payment thereof," may be declared upon as a promiſſory note.

THIS was an action of aſſumpſit, brought by the plaintiff as the payee of the two following notes againſt the defendants as the makers.

"No. 300. *Original Security Bank London* No. 300.
35 *Cornhill.* This 7th day of *September* 1797.
£25. On the 19th day of *November* next and after that date on demand we promiſe to pay to —— or bearer £25., *being a portion of a value as under depoſited in ſecurity for the payment hereof*, according to the receipt in our hands.
HARTSINCK and Co."

The value depoſited conſiſted in titles to property marked $\frac{A}{Q}$.

"No. 41. *Original Security Bank London* No. 41.
No. 35 *Cornhill.* This 5th day of *July* 1797.
£50. On the 19th day of *October* next and after that date

1798.

HAUSSOULLIER *againſt* HARTSINCK.

on demand we promiſe to pay to —— or order £50 for value depoſited and regiſtered $\frac{A}{V}$ HARTSINCK and Co."

The defendants pleaded the general iſſue, and on the trial at *Guildhall* a ſpecial caſe was reſerved for the opinion of this Court.

The defendants are bankers in *London*, the ſtile of their houſe being "The Original Security Bank." Previous to the iſſuing of the notes in queſtion *J. Richardſon* had applied to the defendants to accommodate him with the loan of their notes to the amount of 3200*l.* on the ſecurity of two renters ſhares in the *Drury-lane* theatre; in conſequence of which a deed was entered into, dated 20th *July* 1797, by which *Richardſon* covenanted to ſupply the defendants with ſufficient money to diſcharge all ſuch notes as ſhould be iſſued by the defendants on his account, and if he ſhould not that he would pay the defendants all ſuch money as they ſhould advance on them with intereſt at five per cent. per annum, it being agreed that they ſhould never be in advance in caſh for him on account of ſuch notes; and by which deed *Richardſon* aſſigned to two truſtees certain deeds and conveyances by which he was entitled to and poſſeſſed of certain clear rents for every night on which any theatrical performance ſhould be exhibited at *Drury-lane* and of certain privileges and advantages in and out of the ſaid theatre for the reſidue of certain terms of years, in truſt as a collateral ſecurity for the defendants. In conſequence of this agreement and deed the defendants iſſued notes to *Richardſon* to a large amount, and (inter alia) the two notes in queſtion, which have the ſtamps on them required for promiſory notes. The plaintiff diſcounted the notes in queſtion, and is a bonâ fide holder of them for a valuable conſideration. The queſtion for the opinion of the Court is, whether the plaintiff is entitled to recover on both or either of the notes.

Ward was to have argued this caſe for the plaintiff, and

Park for the defendant. But the Court hinting a ſtrong opinion in favour of the plaintiff,

Park ſhortly ſtated the ground on which this caſe had been conſidered in the Court of Chancery, from whence it came. That the notes were not payable at all events, but payable out of a particular fund alluded to in the notes, in caſe that fund ſhould be ſufficient. That the ſum ſecured by one of them was deſcribed as "a portion of a value as," &c, in terms pointing out the fund out of which it was to be paid. That the payee was of courſe to reſort to that fund and not to the makers at all events. But that even if the makers of the notes were abſolutely liable, then the notes ſhould have had a proper ſtamp for an agreement and not merely a ſtamp for a promiſory note, the notes being agreements for a loan. But

The Court ſaid they were clearly of opinion that, though as between the original parties to the tranſaction the payment of the notes was to be carried to a particular amount, the defendants were liable on theſe notes which were payable at all events. And that the notes were on proper ſtamps.

Poſtea to the plaintiff.

The KING *againſt* the Inhabitants of ST. MARY ON THE HILL, *Cheſter*.

Saturday, June 23d.

Upon a ſuggeſtion entered by leave of the court upon the roll that a fair and impartial trial cannot be had in the county of the city of *Cheſter*, the Court will award the trial to be had in the adjoining county palatine.

THIS was an indictment for the non-repair of a road lying within the county of the city of *Cheſter* (*a*), returned by certiorari into this court; and on a former day a rule had been obtained, on the motion of *Erſkine* for the proſecutor, for leave to enter a ſuggeſtion on the record that a fair and impartial trial could not be had in that county; and praying the Court to award a trial in the county of *Salop*, that being the next *Engliſh* county where the King's writ of venire runs; it having been decided in the caſe of *The King* v. *Amery* (*b*) that this Court could not ſend down ſuch a record by mittimus to the chief juſtice of the county palatine of *Cheſter*, which was in fact the next county to the county of the city of *Cheſter*.

Chambre for the defendants admitted that the Court had ſo decided in the caſe alluded to; and the rule was made abſolute without further diſcuſſion. But upon this day,

Lord KENYON Ch. J. ſaid that he had ſince taken the matter into conſideration, and was ſatisfied that the opinion delivered in the caſe of *The King* and *Amery* had proceeded upon a miſtake, in ſuppoſing that becauſe the King's writ of venire facias could not run into the county palatine of *Cheſter*, therefore this Court could not award the trial to be had there, and that the practice had been accordingly; but upon examination it appeared that in the caſe of

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(*a*) *Cheſter* is one of the places excepted out of the late act of the 38 *Geo.* 3. *cap.* 52.

(*b*) *Ante*, 1 vol. 363.

1798. The King against The Inhabitants of St. Mary.

The King v. *Ellames* (*a*) where the matter originated in the county of the city of *Cheſter* the record was ſent down to be tried in a county palatine; and there were other inſtances (*b*) ſtated in the caſe of *The King* v. *Amery* (*c*); therefore

Per Curiam—Let the ſuggeſtion prayed for be entered on the roll, and let the record be ſent down by mittimus to be tried in the county palatine of *Cheſter*.

(*a*) This is the ſame caſe as is reported 2 *Stra.* 976. and *Rep. Temp. Hardw.* 42. for another point. But in the report in 2 *Barnard.* 402. it appears to have been much conſidered whether there could be a ſpecial jury in that caſe out of the county palatine of *Cheſter*, the matter originating in the county of the city; and the Court ultimately decided that there might.

(*b*) One of them is *R.* v. *Johnſon*, *H.* 7 *Geo.* 2.

(*c*) It is not ſtated on the records in the two inſtances alluded to that the trials were by conſent: but in the argument of *The King* v. *Amery* the caſe of *The King* v. *Johnſon* was *ſtated* to have paſſed by conſent.

The King *againſt* E. M. Despard.

Monday, 25th June.

A commitment for *treaſonable practices* is legal.

The defendant was brought up in the cuſtody of the governor of the houſe of correction by virtue of a writ of habeas corpus iſſued out of this court upon the motion of *Ferguſſon*, who now moved that the warrant of commitment returned and produced in court might be read; which being done it appeared that the defendant had been committed "*for treaſonable practices*" by a warrant of the Duke of Portland one of his Majeſty's principal ſecretaries of ſtate.

An act was paſſed in the preſent ſeſſion of parliament, 38 *Geo.* 3. *c.* 36. for ſuſpending the habeas corpus act, whereby it is enacted "that every perſon or perſons that are or ſhall be impriſoned within the kingdom of *Great Britain* at or upon the day on which the act ſhould receive the royal aſſent or after by warrant of his Majeſty's moſt honourable privy council, ſigned by ſix of the ſaid privy council, for high treaſon, ſuſpicion of treaſon, *or treaſonable practices*, or by warrant ſigned by any of his Majeſty's principal ſecretaries of ſtate for ſuch cauſes as aforeſaid, may be detained in cuſtody without bail or mainprize until the 1ſt *February* 1799, and that no judge or juſtice of the peace ſhall bail or try any ſuch perſon or perſons ſo committed without order from his Majeſty's privy council, ſigned by ſix of the ſaid privy council, till the ſaid 1ſt *February* 1799."

The Attorney General firſt moved to quaſh the writ quià improvide emanavit; becauſe he ſaid this was a caſe within the above

ſtatute

ſtatute of the 38 *Geo.* 3., by which the Court could neither bail nor diſcharge the defendant; and therefore the writ itſelf ought not to have been granted. But

The Court refuſed to quaſh the writ; ſaying that it did not follow that becauſe they might neither diſcharge nor bail the defendant after hearing the caſe argued, therefore the writ was improvidently iſſued.

Thereupon the return being firſt filed, *Ferguſſon* moved that the defendant ſhould be diſcharged for the inſufficiency of the warrant of commitment, it being for *treaſonable practices* generally, without ſpecifying the particular nature of them. The habeas corpus act 31 *Car.* 2. *c.* 2. was paſſed not only in affirmance of the common law but alſo in order to carry more effectually into execution the proviſion of a former act of the 16 *Car.* 1. *c.* 10. *ſ.* 8. aſſuring to the party committed by the King or any of his privy council his writ of habeas corpus; and requiring the return to certify *the true cauſe of ſuch his detainer or impriſonment*; and that the Court ſhould proceed to examine and determine whether the cauſe of ſuch commitment appearing upon the ſaid return be juſt and legal, or not; and ſhould thereupon do what to juſtice ſhould appertain, either by *delivering*, bailing, or remanding the priſoner. The act of the 31 *Car.* 2. points out the means by which the writ is to be executed: and with reſpect to ſtate offences, it enacts that if a perſon be committed for high treaſon plainly and ſpecially expreſſed in the warrant, and be not indicted within a certain time, he ſhall be diſcharged: and as to leſs offences the Court are to examine the warrant to ſee whether it contain a legal charge of any offence; and if ſo, whether bailable; and if bailable, they are to diſcharge the party upon his giving ſufficient ſurety according to the nature of the offence. Under theſe acts the Court are bound to examine into the legality of the warrant at common law, and adjudge accordingly. Then the 38 *Geo.* 3. *c.* 36. which ſuſpends the habeas corpus act for a limited time in reſpect to perſons committed for high treaſon, ſuſpicion of treaſon, or treaſonable practices, was not intended nor does it purport to do away the neceſſity of a legal warrant of commitment at common law; but the only effect of it is to give a power amongſt others to the ſecretaries of ſtate, (ſo far authorizing the power to commit long aſſumed by them in this country,) to impriſon for a longer ſpace of time than ordinary, without bringing the party impriſoned to trial. The Court will never put ſuch a conſtruction on the ſtatute as by implication to infringe the liberties of the ſubject. And ſo far is the ſtatute from

1798.

The King *againſt* Despard.

from warranting by expreſs words any new form of commitment that it has immediate reference to commitments at common law; for it refers to ſuch perſons as ſhall be in priſon under any warrant of commitment *at the day of paſſing the act* or afterwards, and it makes no diſtinction as to the form of the commitments before or after the paſſing of the act, and does not profeſs to legalize ſuch as were made before the act if contrary to law. Then the only queſtion is whether a commitment for *treaſonable practices* generally be good at common law. In the petition of rights 3 *Car.* 1. *c.* 1. *ſ.* 5. after ſtating that of late many ſubjects had been impriſoned without any cauſe ſhewn, and when brought before juſtices by writs of habeas corpus no cauſe was certified but that they were detained by the King's ſpecial command ſignified by the lords of the privy council, without being charged with any thing to which they might make anſwer, the parliament proceed to condemn ſuch practice as contrary to law and the right of the ſubject. This (ſays *Selden*) was meant of charges which could not be put into the ſhape of an indictment. Lord *C. J. Vaughan* in *Buſhell*'s caſe (*a*) ſays that in the return to a habeas corpus, the cauſe of the impriſonment ought to appear as ſpecifically and certainly to the judges of the return as it did to the court or perſon authorized to commit; otherwiſe the Court cannot judge whether the cauſe of the commitment be according to law or not. For the ſame reaſon all the crown writers agree that the warrant muſt ſet forth the cauſe of commitment with convenient certainty, though it need not be with ſo much preciſion as in an indictment; 2 *Inſt.* 52. 591. 2 *Hawk. c.* 16. *ſ.* 16. 2 *Hale* 111. And formerly it was conſidered that a commitment for high treaſon generally was bad, without ſpecifying the particular ſpecies of high treaſon; though that has been holden otherwiſe ſince in the caſe of Sir *W. Windham* (*b*), becauſe all ſpecies of high treaſon are capital and of the ſame degree; but ſtill the Court will bail upon a commitment for felony generally (*c*). Now here the charge of treaſonable practices is of a very indefinite nature. It muſt mean ſomething partaking of treaſon. It may be high treaſon, or petty treaſon, or miſpriſion of either, or being acceſſary after the fact to either: it may be the publiſhing of a ſeditious libel, or even the drinking to the health of a traitor, or aſſerting the pope's ſupremacy; in ſhort the kinds of treaſonable practices are ſo various that the Court cannot poſſibly know what the offence is of which this defendant is accuſed. In the caſe of

(*a*) *Vaugh.* 137. (*b*) 1 *Stra.* 2. and 3 *Vin. Abr.* 515. (*c*) Vid. 2 *Wilſ.* 158.

Wilkes,

Wilkes (*a*), who was committed for a miſdemeanor, the counſel for the crown admitted, and the Court held, that it muſt appear upon the face of the warrant for what particular ſpecies of crime or miſdemeanor the party was committed. In *Chamber*'s caſe (*b*) a commitment by the lords of the privy council "for inſolent behaviour and words ſpoken at the council table" was holden inſufficient; ſo a warrant "for divers cauſes and miſdemeanors," *Freeman*'s caſe (*c*). In Lord *Shafteſbury*'s caſe (*d*) the Court had no doubt that a commitment by the Houſe of Lords "for a high contempt againſt the Houſe," generally, was bad; but they would not meddle with a matter out of their juriſdiction. So Dr. *Alphonſo* (*e*) being committed by the college of phyſicians for ill-practiſing of phyſic the return was holden inſufficient and the Court would have diſcharged him, but to prevent his being taken again upon a better warrant he was bailed. Beſides great inconveniencies would enſue if a commitment for a cauſe ſo generally charged were deemed ſufficient. In caſe of an eſcape permitted by a gaoler it would be impoſſible to aſcertain the degree of offence of which he had been guilty, as that follows the nature of the offence for which the party was committed. The Court cannot tell whether the commitment be for an offence bailable or not; or if bailable, what bail ought to be required. The party committed has no opportunity of knowing againſt what charge he is to prepare his defence. This inconvenience does not occur in caſes of high treaſon, where by the act of the 7 *W.* 3. *c.* 3. *ſ.* 1. the priſoner is to have a copy of the indictment containing the overt acts charged a certain number of days previous to his trial. This uncertainty alſo deprives the ſubject of one of the moſt eſſential privileges ſecured to him by the habeas corpus act, namely, that he ſhall not be vexatiouſly committed again for the ſame offence after having been once diſcharged; for under cover of ſo general a charge the Court cannot know whether the commitment were for the ſame offence or not. Laſtly in caſe of an action for falſe impriſonment, the party committing muſt juſtify it for the ſpecific offence contained in the warrant; but this lets him into a variety of proof of different offences.

The Attorney General contrà diſclaimed any intention of arguing that the act of 38 *Geo.* 3. meant to legalize warrants in any other form than was warranted by the common law, but ſaid that this

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(*a*) 2 *Wilſ.* 156, 8. (*b*) *Cro. Car.* 133.
(*c*) *Cro. Car.* 579. (*d*) 1 *Mod.* 144.
(*e*) 2 *Bulſtr.* 259. The caſe ſtates the commitment to have been for practiſing phyſic.

form of commitment had been in conſtant uſe at leaſt from the time of King *William* to the preſent; and he referred to ſeveral precedents to the amount of above fifty in all (*a*) in the ſeveral reigns of King *William*, Queen *Anne*, *George* 1ſt, 2d, and 3d, of ſimilar commitments by ſecretaries of ſtate and members of the privy council; ſome of theſe latter ſigned by the Lords *Nottingham*, *Somers*, and *Cowper*. And he referred in particular to a recent caſe of *Sayre* v. Lord *Rochford* (*b*), where the warrant of commitment was in the ſame form for *treaſonable practices*; and yet it never occurred to the plaintiff's counſel (*c*) to object to the legality of the warrant, although they did not want either inclination or talents to have raiſed the objection if they had thought there was any foundation for it. This practice is alſo confirmed by the ſeveral acts of parliament which have from time to time been paſſed for the ſuſpenſion in part or in whole of the habeas corpus act; for they all ſuſpend its operation in caſes of *commitments for treaſonable practices* although no ſuch offence is ſpecifically noticed in the habeas corpus act itſelf: they amount therefore to legiſlative recognitions of the practice of commitments in that form. Even with reſpect to the ſubject there is a degree of lenity in many caſes in this mode of commitment; for it often happens that the facts diſcloſed would warrant a commitment for high treaſon; but if there be any doubt in the caſe the commitment is only for treaſonable practices, which under the habeas corpus act, at times when it is in force, would entitle the party to be bailed. As to offences of the ſame nature committed in *Scotland*, the practice there is to commit on ſuſpicion of treaſon; which practice is alſo recogniſed by the acts of ſuſpenſion referring to it in the ſame manner as they do to the practice of committing for treaſonable practices in *England*. The arguments of inconvenience drawn from the uncertainty of the charge

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(*a*) The following were ſome of them.

Nathaniel Sharpe committed for treaſonable and ſeditious practices 15th *October* 1694, admitted to bail.

James Murray for treaſonable practices 26th *October* 1694, bailed.

John Gordon for the ſame 1ſt *July* 8 *W*. 3. bailed.

Charles Croſſe for dangerous and treaſonable practices 29th *October* 8 *W*. 3. bailed.

William Jackſon for treaſonable and ſeditious practices 12th *February* 2 *Anne*.

Cecilia Haines alias *Ruſſel* and *Richard Haines* for treaſonable practices 23d *October* 5th *Anne*.

Richard Butler for dangerous and treaſonable practices 14th *May* 2 *Geo*. 1.

Johnſon alias *Kelly* for treaſonable practices 4th *June* 8 *Geo*. 1.

David Boyce for the ſame 27th *May* 9 *Geo*. 1.

John Purſer for the ſame 27th *November* 20 *Geo*. 2.

(*b*) 2 *Blac*. 1165.

(*c*) Theſe he ſtated to be the late Mr. *Lee* and Serjeant *Glyn*: but the report being only of what paſſed in Bank in *C. B.* does not of courſe mention Mr. *Lee's* name.

are at leaſt as ſtrong againſt commitments on ſuſpicion of treaſon, for mere ſuſpicion may not even amount to treaſonable practices, and yet they are admitted on all hands to be legal.

He alſo referred to inſtances of commitments for treaſonable practices, where the practice was ſo far recogniſed in this court as that the parties were thereupon bailed, and not diſcharged: one was the caſe of the Biſhop of *Rocheſter* (*a*) 9 *Geo.* 1722, and the other was *Platt*'s caſe, *Eaſter* T. 1777. The caſe in *Bulſtrode*, which is ſcarcely intelligible, bears no analogy to the preſent; at any rate the commitment there did not ſtand on the ſame ground of precedent, and perhaps that caſe is not law. He alſo adverted to the doubt which had been inſinuated rather than inſiſted on as to the power of the ſecretaries of ſtate to commit for ſtate offences; and obſerved that it had been recogniſed by Lord *Holt* in 12 *Mod.* 82. who ſaid it had never been queſtioned till lately.

Ferguſſon in reply obſerved that the caſe of *Sayre* v. Lord *Rochford* could not be conſidered as an authority in ſupport of the practice, becauſe the objection was never taken; and that as no caſe had been cited where ſuch a warrant was expreſsly holden to be legal it could not now be aſſumed that it was ſo. That the practice of the ſecretary of ſtate's office was of no weight; for that might have been urged as ſtrongly in ſupport of general warrants which were now univerſally admitted to be illegal, though ſanctioned by as much extrajudicial authority. And this practice was if any thing rather more inconvenient than that, becauſe the certainty of the offence in the warrant is of more conſequence than the naming of the offender; for the perſon arreſted by virtue of a general warrant was at leaſt ſufficiently informed of the nature of the charge againſt him, and could prepare himſelf better either for his defence or for redreſs than under a warrant of this deſcription.

Lord Kenyon Ch. J. Though experiments of this kind have been frequently made in courts of juſtice, they ſeldom ſucceed. I remember when a doubt was made whether or not the Houſe of Commons had the power of committing to priſon. On that occaſion a gentleman of great character and fortune, Sir *J. Phillips*, who had retired from the bar, appeared in this court for the purpoſe of moving that the perſon who had been committed by the Houſe might be diſcharged: the Court heard him patiently, and

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(*a*) The report of this caſe in *Forteſ.* 101. which is dated *Old Bailey* 7th *Sept.* 8 *Geo.* 1. ſtates that the Biſhop and ſome others who were committed with him were committed for *high treaſon plainly expreſſed in the warrant of commitment.*

the

the public perhaps were gratified with hearing the queſtion diſcuſſed; and though the motion was unſucceſsful, I believe the public were ſatisfied that juſtice was properly adminiſtered. Many other caſes of this kind have been agitated in this court, where they have met the ſame fate. That every queſtion concerning the liberty of the ſubject is important I admit: but it does not follow that, becauſe it is important, it is difficult to decide. The counſel, who moved to diſcharge this defendant, threw in a doubt whether or not a ſecretary of ſtate has a right to commit, for his expreſſion was "the power *aſſumed* by the ſecretaries of ſtate:" but if we are to learn from the records in courts of juſtice and from the received practice at all times what is the law of the land, I have no difficulty in ſaying that the ſecretaries of ſtate have the right to commit. This right was not even doubted by Lord *Camden*, who expreſſed as great anxiety for the liberty of the ſubject as any man; indeed it has been thought by ſome perſons eminent in our profeſſion, who have conſidered the point ſince, that he rather overſtepped the line of the law in the caſe of *R.* v. *Wilkes*; and certainly if that judgment can be ſupported, many other caſes that have been ſolemnly determined cannot be reconciled with it.

In this caſe two queſtions have been made; one, whether the late act of parliament authoriſed any new form of commitment: but that queſtion was at reſt almoſt as ſoon as it was raiſed; the Attorney General very properly admitted that that act made no alteration in the form of commitments. The other queſtion is, whether or not this commitment be good at common law. To one argument uſed by the defendant's counſel I cannot aſſent, namely, that no point is to be conſidered as law unleſs it has been made and judicially decided: if that were true, farewel to the common law of the land. If I were aſked in what caſe it was determined that a limitation to *A.* and his heirs gives a fee ſimple, I ſhould be as unable to anſwer as Lord *Hale* was when the queſtion was put to him. It is ſufficient if the point has been acknowledged to be law at all times: the law of the land ſtands on precedents. I will not ſay whether or not the number of caſes from the ſecretary of ſtate's office conſtitutes the law upon this ſubject; but the courſe of office and variety of precedents acted upon have been conſidered by very able judges as evidence of what is the law of the land; and I cannot get over the caſes now referred to by the Attorney General. The com-

The KING *againſt* DESPARD.

mitments prior to the revolution were complained of as grievances, and probably they gave riſe to the habeas corpus act: and if the inſtances of commitments mentioned on the part of the crown had happened in the reigns of *Charles* the ſecond or *James* the ſecond, I ſhould not have relied much upon them. But the caſes now cited happened ſince the revolution; a time that Mr. J. *Foſter* and other great men conſidered as an auſpicious period for this country, and when the liberties of the ſubject were well underſtood and nobly aſſerted. Then let me ſee what was conſidered to be the law of the land at and after the revolution, and particularly in the time of that great man Lord *Holt*. Out of the many caſes that have now been mentioned I have ſelected nine that cannot be diſtinguiſhed from the preſent caſe, where the commitments were for "treaſonable practices" generally, and where Lord *Holt* and the reſt of the Court were bound by their oaths to diſcharge the defendants if the commitments were illegal; and yet the Court did not diſcharge them. Finding theſe caſes, I will not now inquire whether or not Lord *Holt* decided rightly; I have no ſources of intelligence from which I could make the inquiry; the records of the Court furniſh me with the law of the land. Lord *Holt* was a man above all praiſe; and he was aſſiſted by able judges, one of whom was Mr. Juſtice *J. Powell*, who fell little ſhort of Lord *Holt* himſelf. I will not overturn the law of the land as it has been handed down to me: it is not for the judges, who are to watch over the law, to overſet it. Therefore on the authority of the precedents, nine of which are preciſely in point, I am clearly of opinion that if we were to yield to this application we ſhould forget the duty we owe to the public.

ASHHURST J. The concurrence of men of ſuch talents as Lords *Nottingham*, *Somers*, *Holt*, and *Cowper*, when acting on warrants of this kind, is nearly equal in authority to an expreſs deciſion on the very point. It is rather an extraordinary poſition of the defendant's counſel in this caſe that nothing is to be conſidered as law but what has been ſolemnly decided; for a point may be ſo clear that it was never doubted, and yet if this poſition were well founded it would not be law.

GROSE J. The queſtion is whether the priſoner has a right to be bailed or diſcharged, or whether we are not bound by the late act of parliament to remand him. The ground, on which it is now contended that he ought to be bailed or diſcharged, is that the warrant does not ſpecify what are the treaſonable practices of

which

The King *againſt* Despard.

which he is accuſed. Now it is admitted that a perſon may be committed for treaſon or ſuſpicion of treaſon without ſpecifying the particular kinds of treaſon, and it now appears that there are precedents of warrants of commitment for treaſonable practices preciſely in the form of this warrant from the year 1694 to the preſent time. Then came the late act of parliament, which ſays that perſons detained under warrants of commitment for *treaſonable practices*, in the very words of this warrant, ſhall not be bailed; and yet we are deſired to diſcharge this priſoner againſt the poſitive directions of the act of parliament. I am glad however that the habeas corpus was granted, becauſe the parties have had an opportunity of canvaſſing this point of law; and magiſtrates will know how to regulate their future practice by this deciſion.

Lawrence J. The caſe chiefly relied on by the defendant's counſel is that in *Bulſtrode:* but that caſe is not law; for in a ſubſequent caſe, Dr. *Grenville* v. The College of Phyſicians (*a*), it was holden that the cenſors of the college were the ſole judges whether or not a perſon within their juriſdiction had been guilty of malpractice in phyſic. With regard to the precedents cited of warrants like this, I think they are deciſive of the preſent caſe. They are not to be compared to warrants ſigned by magiſtrates, who are not of the profeſſion of the law, for ſome of them were ſigned by perſons of the greateſt eminence in the law, and therefore they are entitled to have great weight. Beſides which it appears that ſeveral of the perſons committed by thoſe warrants have been at different times ſince the revolution brought up here, and that this Court thought they ought to be remanded unleſs they could give ſecurity. I cannot expreſs myſelf better on this occaſion than *Parker* Ch. J. did in Sir *William Wyndham*'s caſe (*b*), where he ſaid " It has been urged that ſome particular ſpecies of treaſon muſt be expreſſed, and that it muſt have ſo much certainty as to appear to be high treaſon to the Court. I think this opinion is not to be maintained. We preſume a magiſtrate does right until the contrary appears; and it has never been holden neceſſary to expreſs the overt act in the commitment." So in caſes of this ſort it is not neceſſary to expreſs in the warrant the particular ſpecies of treaſonable practices.

Per Curiam, Let the priſoner be remanded.

(*a*) 12 *Mod.* 386.

(*b*) 1 *Str.* 3.

The KING *againſt* EDWARDS.

Tueſday, June 26th.

If an apprentice be impreſſed into the ſea-ſervice, the maſter cannot ſue out a habeas corpus to bring him up to be diſcharged, though the apprentice may. —But the Lord Chief Juſtice may iſſue a warrant to bring him up on the application either of the maſter or the apprentice.

ONE *Gabriel*, an apprentice, having entered into the ſea-ſervice and received the bounty money, the maſter moved for a habeus corpus to bring him up in order that he might be reſtored to him. Then

Perceval obtained a rule to ſhew cauſe why the writ of habeas corpus ſhould not be quaſhed quia improvidè emanavit, on the ground that this application was made by the maſter and not by the apprentice. And he relied on the caſe of *R.* v. *Reynolds*, *ante* 6 vol. 497.

Erſkine now ſhewed cauſe againſt that rule; contending that no apprentice could be impreſſed (*a*) either in the army or navy; that it was even part of the oath taken by a ſoldier on enliſting that he was not an apprentice; and that if the apprentice were improperly detained, the Court ought to grant a habeas corpus either at the inſtance of the maſter or the apprentice. But

The Court ſaid that the diſtinction was properly taken in the caſe cited; that though the apprentice might obtain the writ the maſter could not, for that its object was the protection of the liberty of the party. That the maſter was not without a remedy, for that he might have his action againſt thoſe who detained the apprentice after knowing him to be an apprentice. But they added that the Lord Chief Juſtice had the power, under an old ſtatute paſſed in the reign of *Henry* 8, of granting warrants for the purpoſe of bringing up apprentices in this ſituation, and that Lord *Mansfield* had frequently exerciſed that power. And

Lord KENYON added that, though the Court would make this rule abſolute to quaſh the writ of habeas corpus, he ſhould iſſue his warrant to bring *Gabriel* before him to be diſcharged unleſs the Admiralty agreed to releaſe him (*b*).

Rule abſolute.

(*a*) He produced an affidavit, in which it appeared that the apprentice was as anxious to return as the maſter was to have him again: but he admitted that the maſter alone had applied for this habeas corpus.

(*b*) On which *Perceval* undertook to repreſent the matter to the Admiralty.

1798.

Wedneſday, June 27th.

The KING *againſt* ALLGOOD.

A freehold tenant of a manor has no right to inſpect the court-rolls, unleſs there is ſome cauſe depending in which his right may be involved.

A RULE having been obtained calling on the defendant, the lord of the manor of *Simonburn* in the county of *Northumberland*, to ſhew cauſe why a mandamus ſhould not iſſue, commanding him to permit *J. Thomſon* a freehold tenant of the manor to inſpect the court-rolls of the manor and to take copies of them, founded on an affidavit of *J. Thomſon* which merely ſtated that he was a freehold tenant of the manor, that he had occaſion to inſpect the court-rolls, and that he had applied for an inſpection which had been refuſed;

Wood now ſhewed cauſe againſt it; inſiſting that a freehold tenant had no right to demand an inſpection of the rolls of the manor unleſs there were ſome cauſe or proceeding inſtituted, in which his right might be involved.

Holroyd, in ſupport of the rule, relied on the caſe of *R.* v. *Shelley*, *ante* 3 vol. 141, and the caſes there referred to, to ſhew that in all caſes a freehold tenant has a right to inſpect the court-rolls; obſerving that the lord of the manor is merely the keeper of the rolls, and that the free ſuitors are the judges. But

The Court were of opinion that unleſs there were ſome cauſe depending the tenant had no right to call for an inſpection of the court-rolls. And ſaid, that it appeared in each of the caſes cited in ſupport of the rule that there was ſome cauſe or proceeding inſtituted. Therefore they

Diſcharged the rule.

END OF TRINITY TERM.

AN

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AFFIDAVIT *to hold to Bail.*

1. The Court refuſed to diſcharge a defendant out of cuſtody on the ground that the affidavit on which he had been holden to bail was intitled in the cauſe. *Clarke* v. *Cawthorne*, *T.* 37 *G.* 3. 321
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AMENDMENT.

1. The Court will grant leave to amend in penal actions, even after the time limited for bringing a new action, provided the plaintiff has not been guilty of any unneceſſary delay in proſecuting his ſuit, and the amendment prayed for does not introduce any new ſubſtantive cauſe of action. *Maddock q. t.* v. *Hammett*, *M.* 37 *G.* 3. 55
2. The Court will grant leave to amend the declaration according to the bill filed by increaſing the damages, even after verdict, ſetting aſide the verdict and granting a new trial. *Tomlinſon* v. *Blackſmith*, *H.* 37 *G.* 3. 132
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5. The Court will give leave to amend a record by inſerting a ſpecial memorandum of the day when the plaintiff's bill was filed after a writ or error brought, but no ſuch alteration can be made without leave of the Court though by conſent of the other party. *Dickinſon* v. *Plaiſted*, *H.* 38 *G.* 3. 474
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8. All amendments are within the diſcretion of the Court, and are allowed in furtherance of juſtice under the particular circumſtances of the caſe. *Page* 699

ANNUITY,

See DEBTOR, No. 2.

1. *A.* who was tenant for life, with remainder to truſtees &c, remainder to his firſt and other ſons in tail, remainder to himſelf in fee, ſuffered a recovery with *B.* his only ſon, and declared the uſes to ſuch perſon and for ſuch eſtate &c as they ſhould jointly appoint; they jointly granted an annuity and appointed and granted the lands to *C.* for a term of years in truſt for the grantee: held that this caſe came within the exception of the annuity act. *Halſey* v. *Hales*, Bart. *E.* 37 *G.* 3. 194

2. A clauſe of redemption contained in an annuity-deed muſt be inſerted in the memorial. *Harris* v. *Stapleton*, *E.* 37 *G.* 3. 205

3. If the conſideration-money of an annuity be paid by an agent on behalf of the principal, it muſt be ſo ſtated in the deed, and it is not ſufficient to ſtate that it was paid by the principal. *Dalmer* v. *Barnard*, *E.* 37 *G.* 3. 248

4. If an agent of the grantee of an annuity actually pay the conſideration-money to the grantor, that fact muſt be ſtated in the deeds granting the annuity. *Glaſſe* v. *Mount*, *M.* 38 *G.* 3. 390

5. Where upon a ſummary application to ſet aſide an annuity for non-compliance with the requiſites of the 17 *G.* 3. *c.* 26. the rule was diſcharged upon diſcuſſion of the merits, the Court will not entertain a ſimilar application between the ſame parties on the ſame ſtate of facts, though grounded upon a new objection to the annuity, which was not before urged or conſidered. *Greathead* v. *Bromley*, *H.* 38 *G.* 3. 455

6. Where an action was brought by executors on a bond given by the defendant to their teſtator for ſecuring an annuity, and upon a plea of non eſt factum they obtained a verdict and judgment, and levied execution thereon, the Court held that this was not a caſe where they could give relief upon a ſummary application under the annuity act for a defect in the memorial. *Buck and others*, *Executors of Buck*, v. *Tyte*, *H.* 38 *G.* 3. *Page* 495

7. Where an ejectment was brought to recover poſſeſſion of lands extended under an elegit upon a judgment confeſſed which had been entered up upon a warrant of attorney given for ſecuring an annuity, it is too late for the grantor to object to the conſideration of ſuch annuity upon a ſummary application for ſtaying the proceeding after verdict in ſuch ejectment, becauſe he had an opportuniy of making his defence to the action. *Withy* v. *Woolley*, *E.* 38 *G.* 3. 540

8. Money lent and paid at different times for the education and advancement of the defendant is a good conſideration for the grant of an annuity within the 17 *G.* 3. *c.* 26. *ſ.* 3. *Kelſe* v. *Ambroſſe*, *E.* 38 *G.* 3. 551

9. Such a conſideration is ſufficiently expreſſed in the deeds for ſecuring the annuity under the deſcription of "money lent and advanced and alſo paid laid out and expended to and for the maintenance education and advancement in the world of the defendant." *ib.*

APPEAL,

See EXCOMMUNICATION, No. 2.

1. If the appellant has not ten days notice before the Quarter Seſſions of an order of juſtices for turning a road under the ſtatute 13 *G.* 3. *c.* 78. *ſ.* 19., he cannot appeal to thoſe Seſſions, but might wait until the next Seſſions. *R.* v. *The Juſtices of Staffordſhire*, *M.* 37 *G.* 3. 81

2. From what time is the party bound to take notice of ſuch an order? *Qu.*—Not from the act of turning the road; *ſemb.* *ib.*

3. Where the Quarter Seſſions are holden at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original Seſſions but before the adjourned Seſſions, an appeal at the next enſuing adjourned Seſſions is in time and ought to be received. *R.* v. *The Juſtices of Suſſex*, *H.* 37 *G.* 3. 107

4. An appeal againſt an order of removal may be entered at the next Seſſions but one after the order is executed, if there be not time between the execution of the order and the next Seſſions to make inquiries re-

ſpecting the pauper's ſettlement. *R.* v. *The Juſtices of Flintſhire*, *E.* 37 *G.* 3. *Page* 200

APPRENTICES,

See Bills of Exchange and Promissory Notes, No. 1.

1. If a perſon occupy lands in *A.*, though he reſide in another pariſh, he is liable to take a pariſh apprentice in *A.* *R.* v. *J. Barwick*, *M.* 37 *G.* 3. 33

2. And if ſeveral perſons hold lands in partnerſhip in *A.*, ſome of whom reſide on it and the others in another pariſh, the latter as well as the former are liable to take pariſh apprentices in *A.* *ib.*

3. A bye-law made by a company in a corporation to reſtrain the number of apprentices to be taken by any of the members is void. *R.* v. *The Wardens of the Coopers Company of Newcaſtle-upon-Tyne.* *E.* 38 *G.* 3. 543

4. In a mandamus to a company to compel them to inrol indentures of apprenticeſhip, it is ſufficient to ſtate generally that thoſe who have ſerved a free burgeſs &c. under indentures of apprenticeſhip, and whoſe indentures have been inrolled, are entitled to be admitted to their freedom, that *A. B.* had ſerved &c.; that his indentures ought to have been inrolled on being tendered &c; and that they were tendered for that purpoſe, but that the defendants refuſed to inrol them &c. *ib.*

5. If an apprentice be impreſſed into the ſea ſervice, the *maſter* cannot ſue out a habeas corpus to bring him up to be diſcharged, though the apprentice may. But the Lord Chief Juſtice may iſſue a warrant to bring him up on an application either of the maſter or the apprentice. *R.* v. *Edwards*, *T.* 38 *G.* 3. 745

APPURTENANT,

See Grant, No. 1.

ARMY,

See Billeting, No. 1.

ARREST.

1. A defendant who has been arreſted in a foreign country may be arreſted here again for the ſame cauſe of action. *Maule* v. *Murray*, *H.* 38 *G.* 3. *Page* 470

ASSUMPSIT,

See Bills of Exchange, No. 1. Pleading. Statute of Frauds.

1. Where an act is to be done by each party under a ſpecial agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may recover back any money he has paid under it in an action for money had and received. *Giles* v. *Edwards*, *E.* 37 *G.* 3. 181

2. A party cannot recover upon a written contract made in *Jamaica* which by the laws of that iſland was void for want of a ſtamp. *Alves* v. *Hodgſon*, *E.* 37 *G.* 3. 241

3. A promiſe in writing directed to *A.*, *B.*, and *C.*, (a houſe in trade,) to pay for goods to be furniſhed to *D.*, does not extend to goods to *D.* by *B.* and *C.* after *A.* had withdrawn from the partnerſhip. *Myers* v. *Edge*, *E.* 37 *G.* 3. 254

4. Where money has been paid by the plaintiff to the defendant under the compulſion of legal proceſs, and it is afterwards diſcovered that the money was not due, the plaintiff cannot recover it back in an action for money had and received. *Marriott* v. *Hampton*, *E.* 37 *G.* 3. 269

5. Aſſumpſit lies by the loſer to recover a ſum depoſited upon the event of an illegal wager even after ſuch event. *Lacauſſade* v. *White*, *E.* 38 *G.* 3. 535

ATTACHMENT,

See Award, No. 2. Discontinuance, No. 1. Practice, No. 8, 9. 13.

1. The Court will not grant an attachment againſt a peer for not paying money awarded, though the defendant conſent that it ſhall iſſue on condition that it ſhall lie in the office for a certain time. *Walker* v. *The Earl of Groſvenor*, *H.* 37 *G.* 3. 171

2. Nor againſt a member of parliament. *Catmur* v. *Sir E. Knatchbull*, *M.* 38 *G.* 3. 448

INDEX TO THE PRINCIPAL MATTERS.

ATTORNEY,

See Practice, No. 11. Warrant of Attorney, No. 1.

1. The privileges of an attorney only continue while he is a practiſing attorney and while he has the certificate required by 25 *G.* 3. *c.* 80. *Brooke* v. *Bryant*, *M.* 37 *G.* 3. *Page* 25
2. And therefore it was ruled that an attorney, who had not practiſed for ſeveral years, might be arreſted, though after the ſuing out of the writ and before the arreſt he recommenced his practice and took out his certificate. *ib.*
3. An attorney plaintiff may ſue by common proceſs and indorſe his own name on the copy as the attorney, and may afterwards declare by another attorney. *Jackſon* v. *Barnard*, *M.* 37 *G.* 3. 35
4. An attorney is not liable to be rated to the poor in reſpect of the profits of his profeſſion. *R.* v. *J. Startifant*, *M.* 37 *G.* 3. 60
5. The ſtat. 2 *G.* 2. *c.* 23. requiring (as a previous qualification to being admitted as an attorney) that the party ſhall *continue in the ſervice* of the attorney to whom he is articled for five years, is not complied with by the clerk ſerving part of the time with another attorney with his maſter's conſent, and the reſt of the time with his maſter. *Ex parte Hill one &c. H.* 38 *G.* 3. 456
6. An attorney when in priſon may ſue by attachment of privilege for a debt of his own notwithſtanding the ſtat. 12 *G.* 2. *c.* 13. *ſ.* 9. *Kaye one &c.* v. *Denew*, *T.* 38 *G.* 3. 671

AWARD.

1. The Court have no authority by 9 & 10 *W.* 3. *c.* 15. to make a parol ſubmiſſion to an award a rule of court. *Anſell* v. *Evans*, *M.* 37 *G.* 3. 1
2. Upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award for any illegality apparent on the award though the time for applying to ſet aſide the award is expired. *Pedley* v. *Goddard*, *M.* 37 *G.* 3. 73
3. But the Court will not ſet aſide an award for any defect after the time limited by the ſtat. 9 & 10 *W.* 3. *c.* 15. *ib.*
4. An award that the defendant ſhall pay to the plaintiff ſuch a ſum of money unleſs within twenty-one days (which was after the time limited for making the award) the defendant ſhall exonerate himſelf by affidavit from certain payments and receipts, in which caſe he was only to pay a leſs ſum, is illegal and void, becauſe uncertain and inconcluſive. *Ib.* *Page* 73
5. If an award be made on an improper ſtamp, and no application be made to inforce it, the Court will not ſet it aſide. *Preſton* v. *Eaſtwood*, *H.* 37 *G.* 3. 95
6. Two ſeveral tenants of a farm agreed with the ſucceeding tenant to refer certain matters in difference reſpecting the farm to arbitration, and jointly and ſeverally promiſed to perform the award; the arbitrator awarded each of the two to pay a certain ſum to the third; held that they were jointly reſponſible for the ſum awarded to be paid by each. *Manſell* v. *Burredge*, *T.* 37 *G.* 3. 352
7. If an arbitrator under a reference between *A.* and *B.* adminiſtrator award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-payment. *Worthington* v. *Barlow*, *Adminiſtratrix*, *M.* 38 *G.* 3. 453

B.

BAIL,

See Affidavit to hold to Bail. Practice, No. 2. 8, 9. 14. 26, 27.

1. Bail are not regularly put in, unleſs the name of the proper county be inſerted in the bail-piece. *Smith* v. *Miller*, *H.* 37 *G.* 3. 96
2. If a ſheriff's officer on an arreſt take an undertaking for the appearance of the party inſtead of a bail-bond without the plaintiff's aſſent, and bail above is not duly put in, the ſheriff is liable to an action for an eſcape, and the Court will not relieve him by permitting him to put in and juſtify bail afterwards. *Fuller* v. *Preſt*, *H.* 37 *G.* 3. 109
3. But if the ſheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ. *ib.*

4. Where a bail-bond has been taken, it may be cancelled if the defendant return into the ſheriff's cuſtody before the return of the writ. *Stamper* v. *Milbourne*, *H.* 37 *G.* 3. *Page* 122

5. The Court, on the application of the defendant's bail, granted a habeas corpus to the ſheriff of *H.* in whoſe cuſtody the defendant was under a charge of felony to bring him up, in order that he might be ſurrendered by his bail. *Sharp* v. *Sheriff*, *E.* 37 *G.* 3. 226

6. If an action be brought here againſt bail on a recognizance of bail taken in C. B., they have the ſame indulgence (of 8 days in full term after the return of the writ againſt them) to render the principal as if the recognizance had been taken in this court. *Fiſher* v. *Branſcombe*, *T.* 37 *G.* 3. 355

7. It is not neceſſary to give bail in error on a judgment in debt for goods ſold and delivered and on an account ſtated. *Alexander* v. *Biſs*, *M.* 38 *G.* 3. 449

8. If a defendant be ſent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the Court will order the bail-bond to be cancelled. *Poſtel* v. *Williams*, *H.* 38 *G.* 3. 517

BANKRUPT,
See PLEADING, No. 2.

1. *A.*, having contracted with a canal company to build locks and bridges on the canal as their engineer, purchaſed timber and other materials for the purpoſe, which were laid on the company's premiſes on the banks of the canal; and on the company's advancing money to him they took a bill of ſale of theſe goods, and a ſymbolical delivery of them by a halfpenny; afterwards the company took out execution upon a judgment confeſſed by *A.*, and the ſheriff ſeized theſe goods, and *A.* became a bankrupt: Held that *A.* had not ſuch a poſſeſſion of the goods as would enable his aſſignees to take them within the 21 *Jac.* 1. *c.* 19. *ſ.* 11.; for the beſt delivery was made that the nature of the goods would admit of, they being before on the company's premiſes. *Manton* v. *Moore*, *M.* 37 *G.* 3. 67

2. Alſo ruled that the above bill of ſale was not an act of bankruptcy in *A* *ib.*

3. *X.* became bound as a ſurety with *Y.* to *A.* on the 10th of *Auguſt* 1778, in a bond conditioned for payment in ſix months; on the 1ſt *March* 1780 he became bound with *Y.* to *B.* in a bond conditioned for payment in ſix months; on the 4th of *March* 1780 *Y.* became bound to *X.* in a bond conditioned for payment of the two former bonds, and alſo to indemnify *X.* againſt thoſe two bonds: the money ſecured by the ſecond bond not being paid when it became due, it was holden that the laſt bond was thereby forfeited, though *X.* was not called on to pay the money in the ſecond bond until afterwards, and that *X.* might prove it as a debt under the commiſſion of bankrupt that iſſued againſt *Y.* after the forfeiture and before payment. *Hodgſon* v. *Bell*, *H.* 37 *G.* 3. *Page* 97

4. *A.*, a trader and an officer in the *Eaſt India* Company's ſervice, aſſigned his privilege, conſiſting of ſhipping goods from the *Eaſt Indies* to *England*, to *B.* for a valuable conſideration; and in order to evade the bye-laws of the *Eaſt India* Company which prohibits ſuch aſſignment the goods were ſhipped entered and warehouſed and ſold by the Company in *A.*'s name, and the proceeds carried to his account, but before *A.* received thoſe proceeds from the Company he became a bankrupt; held that his aſſignees were entitled to recover the amount in an action for money had and received againſt the *Eaſt India* Company, who retained the ſame: this being ſuch a poſſeſſion of *goods and chattels* in the bankrupt as falls within the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 11. *Gordon* v. *The Eaſt India Company*, *E.* 37 *G.* 3. 228

5. To bring a caſe within that ſtatute the bankrupt muſt have been a trader when he was in poſſeſſion of the property. *ib.*

6. The Court required an uncertificated bankrupt, who brought trover for goods, to give ſecurity for coſts in caſe he ſhould fail. *Webb* v. *Ward*, *E.* 37 *G.* 3. 296

7. Where a commiſſion of bankrupt is taken out fraudulently or maliciouſly, the Lord Chancellor may under the ſtat. 5 *G.* 2. *c.* 30. order a ſpecific ſum by way of damages to be paid by the petitioning creditor to the bankrupt, or ſign the bond given by the former, and enable the latter to recover the whole penalty of the bond. *Smith* v. *Broomhead*, *T.* 37 *G.* 3. 300

8. The aſſignment of the bond by the Lord Chancellor is concluſive evidence of the fraud or malice in an action brought on ſuch bond, and therefore in an action on ſuch a bond the defendant cannot plead that the commiſſion was not fraudulently or maliciouſly taken out. *Ib.* *Page* 300

9. In a declaration on ſuch a bond it is not neceſſary to ſtate that the commiſſion was fraudulently or maliciouſly ſued out. *ib.*

10. *A.* lent his acceptances to the defendant before his bankruptcy, but they were not paid until afterwards; held that *A.* might maintain an action againſt the defendant for money paid to his uſe notwithſtanding his bankruptcy and certificate, and notwithſtanding the defendant, before his bankruptcy, gave his receipt to *A.* acknowledging ſo much money as the acceptances amounted to. *Snaith* v. *Gale*, *T* 37 *G.* 3. 364

11. *A.* firſt purchaſed one and afterwards another parcel of goods of *B.*, each at ſix-ſix months credit: when the firſt ſum became due *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, *B.* engaging to return to *A.* the overplus when the bill ſhould be paid: *B.* received the amount of the bill and then *A.* became a bankrupt, not having paid for the ſecond parcel of goods: held in an action brought by *A.*'s aſſignees for the ſurplus of the bill that *B.* might retain it to ſatisfy his demand on *A.* for the ſecond parcel of goods. *Atkinſon and others, Aſſignees of Hodges a Bankrupt,* v. *Elliott and another, M.* 38 *G.* 3. 378

12. An uncertificated bankrupt has a right to goods acquired by him ſince his bankruptcy againſt all the world but his aſſignees, and may maintain trover for them againſt a ſtranger. *Webb* v. *Fox, M.* 38 *G.* 3. 391

13. By ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 11 & 12. and 5 *G.* 2. *c.* 30. *ſ.* 29. after any perſon has been convicted on an indictment for falſely ſwearing to a debt under a commiſſion of bankrupt, (on which indictment he is to ſuffer the puniſhment inflicted by the ſeveral ſtatutes againſt perjury,) the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to *in an action*; in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging that the defendant did take ſuch falſe oath. *Holmes and others, Aſſignees of Brook a Bankrupt,* v. *Walſh, H.* 38 *G.* 3. *Page* 458

14. Where the petitioning creditor's debt did not amount to 100*l.* at the time of the act of bankruptcy, but was increaſed to more than 100*l.* by a promiſſory note of the bankrupt due at that time being indorſed to the petitioning creditor before he petitioned for the commiſſion, this debt was deemed ſufficient to ſupport the commiſſion. *Glaiſter* v. *Hewer, H.* 38 *G.* 3. 498

15. In order to conſtitute an act of bankruptcy by a trader in departing from his dwelling-houſe, it is not alone ſufficient that a creditor ſhould be thereby delayed, but the departure muſt alſo have been with that intent. The word "*or*" in the ſtat. of the 1 *Jac.* 1. *c.* 15. muſt be read "*and.*" *Fowler* v. *Padget, H.* 38 *G.* 3. 509

16. In an action of covenant for rent on an indenture brought by the aſſignees of the leſſor (a bankrupt) the leſſee cannot plead that the leſſor nil habuit in tenementis. *Parker and others, Aſſignees of Steel a Bankrupt,* v. *Manning, E.* 38 *G.* 3. 537

17. *A.* and *B.* exchanged acceptances, and each party having negotiated the reſpective bills became bankrupt; and *B.*'s aſſignees were afterwards obliged to pay a dividend as drawer on the bills accepted by *A.*, as well as to pay *B.*'s own acceptances. *Qu.* If *A.*'s certificate is a bar to an action brought againſt him by *B.*'s aſſignees for money paid &c.? *Cowley, Aſſignee of Peters,* v. *Dunlop, E.* 38 *G.* 3. 565

18. *A.* ſold a ſhip to *B.* with a covenant that he had a good title, though in fact he had none. Afterwards *A.* became a bankrupt, and *B.* ſuſtained damage by paying the value of the ſhip to the true owner; held in an action on the covenant by *B.* againſt *A.* ſtating the ſpecial damage, that *A.*'s certificate was no bar. *Hamond* v. *Toulmin, E.* 38 *G.* 3. 612

19. A factor gave his acceptance to his principal for the amount of goods ſold on account, after a ſecret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; held that the payment was protected by the 1 *Jac.* 1. *c.* 15. *ſ.* 14. *Wilkins and another, Aſſignees of Cann,* v. *Caſey, T.* 38 *G.* 3. 711

BARON AND FEME,

See Evidence, No. 3.

1. The huſband cannot be ſued alone for the debt of his wife contracted before marriage. *Mitchinſon* v. *Hewſon*, *T.* 37 *G.* 3. *Page* 348

BARRATRY,

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BILL,

See Writ, No. 1.

BILL IN EQUITY,

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BILLS OF EXCHANGE, AND PROMISSORY NOTES,

See Affidavit to hold to Bail, No. 4. Payments, No. 1.

1. No action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice fee with his ſon who was to be bound to the plaintiff, if it appear that the indenture executed was void by the ſtat. 8 *An. c.* 9. for want of the inſertion of ſuch premium therein and a proper ſtamp in reſpect of the ſame, although the plaintiff did in fact maintain the apprentice for ſome time and until he abſconded. *H* 37 *G.* 3. 121

2. Where the drawers of a banker's check or inland bill of exchange iſſued it nine months after it bore date upon a conſideration which afterwards failed as between them and the perſons to whom they delivered it, they cannot be permitted to object this circumſtance in an action brought by a ſubſequent holder for a valuable conſideration and without notice; though by the general rule any perſon receiving a negotiable inſtrument after it is due is deemed to have taken it upon the credit of the perſon from whom he received it, and ſubject to the ſame equities as between him and the party ſued on ſuch inſtrument. *Boehm* v. *Sterling*, *M.* 38 *G* 3. 423

3. It is not neceſſary in a declaration on a bill of exchange to aver that the maker *delivered* it: it is ſufficient to ſtate that he *made* it. *Churchill* v. *Gardner*, *E.* 38 *G.* 3. 596

4. In an action by an indorſee of a bill of exchange againſt the acceptor, the latter may call the payee as a witneſs to prove that the bill was void in its creation. *Jordaine* v. *Laſhbrooke*, *E.* 38 *G.* 3. *Page* 601

5. If a broker draw on his employer for differences paid for him in ſtock-jobbing tranſactions, and the employer accept the bill, and then the broker indorſe it to a third perſon after it is due, the latter cannot recover on the bill. *Brown* v. *Turner*, *E.* 38 *G.* 3. 630

6. A note, by which *A.* promiſes to pay to the bearer 50 *l.* "being the portion of a "value as under depoſited in ſecurity for "the payment thereof," may be declared upon as a promiſſory note. *Hauſſoullier* v. *Hartſinck*, *T.* 38 *G.* 3. 733

BILL OF SALE,

See Bankrupt, No. 1, 2. Ship, No. 1.

BILLETING.

1. The foot guards may be billeted all over the kingdom as well as the other troops. *R.* v. *Calvert*, *T.* 38 *G.* 3. 724

BOND.

1. A bond in a penal ſum, conditioned for payment of a leſs ſum generally, without naming any day of payment, is payable on the day of the date; and if an action be brought upon it the Court will refer it to the Maſter to compute principal intereſt and coſts, and on payment of the ſame ſtay the proceedings, under ſtat. 4 *An. c.* 16. *ſ.* 13. *Farquhar*, Bart. v. *Morrice*, *H.* 37 *G.* 3. 124

2. Intereſt is due on ſuch a bond, though not expreſsly reſerved. *ib.*

3. A bond given to an individual conditioned to be void if the obligor (on the obligee's agreeing not to proſecute him) ſhould remove certain public nuiſances and not erect any others of the ſame kind, is good in law. *Fallowes* v. *Taylor*, *H.* 38 *G.* 3. 475

BYE-LAW,

See Physicians, No. 2.

1. A bye-law made by a company in a corporation to reſtrain the number of apprentices

ties to be taken by any of the members is void. *R.* v. *The Wardens of the Coopers' Company of Newcaſtle-upon-Tyne*, *E.* 38 *G.* 3. *Page* 543

C.

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CERTIORARI.

1. The Court quaſhed a certiorari, which was iſſued before but not ſerved until after a judgment on an indictment for a miſdemeanor. *R.* v. *The Inhabitants of Seton*, *T.* 37 *G.* 3. 373
2. After judgment the record can only be removed by a writ of error. *ib.*

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COMMITMENT.

1. A commitment for *treaſonable practices* is legal. *R.* v. *Deſpard*, *T.* 38 *G.* 3. 736

COMMON.

1. By a grant of all tithes ariſing out of or in reſpect of *farms lands* &c. the tithes ariſing out of and in reſpect of rights of common appurtenant to ſuch farms or lands will paſs. *Lord Gwydir* v. *Foakes*, *E.* 38 *G.* 3. 641
2. A right of common in groſs is a tenement within the 13 & 14 *Car.* 2. *R.* v. *The Inhabitants of Derſingham*, *T.* 38 *G.* 3. 671

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1. A bond given to an individual conditioned to be void if the obligor (on the obligee's agreeing not to proſecute him) ſhould remove certain public nuiſances, and not erect any others of the ſame kind, is good in law. *Fallowes* v. *Taylor*, *H.* 38 *G.* 3. 475

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1. A conviction muſt contain an adjudication, whether the puniſhment be or be not fixed by ſtatute. *R.* v. *J. A. Harris* *E.* 37 *G.* 3. *Page* 238
2. A conviction of a juſtice of peace having competent juriſdiction, upon which the plaintiff was arreſted and impriſoned, is till reverſed or quaſhed concluſive evidence in favour of the juſtice againſt whom an action of treſpaſs and falſe impriſonment was brought. *Strickland* v. *Ward*, *Wincheſter Sum. Aſſ.* 1757, *cor. Yates* J. 633, n.

COPYHOLD,

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COPYRIGHT.

1. An author whoſe work is pirated before the expiration of twenty-eight years from the firſt publication of it may maintain an action on the caſe for damages againſt the offending party, although the work was not entered at Stationers-Hall, and although it was firſt publiſhed without the name of the author affixed. *Beckford* v. *Hood*, *E.* 38 *G.* 3. 620

CORONERS.

1. The coroners of franchiſes, that do not contribute to the county rates, are not entitled to the fees given by ſtat. 25 *G.* 2. c. 29., or to any fees to be paid by the county. *R.* v. *The Juſtices of W. R. Yorkſhire*, *M.* 37 *G.* 3. 52

CORPORATION,

See APPRENTICES, No. 3, 4. BYE-LAW. MANDAMUS, No. 2.

1. *Semble* that a corporation cannot make a fraternity. *R.* v. *Coopers' Company of Newcaſtle-upon-Tyne*, *E.* 38 *G.* 3. 548

COSTS,

See Bankrupt, No. 6. Discontinuance, No. 1. Rules of Court, No. 1. Practice, No. 1.

1. The proſecutor of an indictment for ſtopping a common footway, who had uſed it for ſome years before it was ſtopped up, is a party grieved within the meaning of 5 *W. & M. c.* 11. *ſ.* 3. *R.* v. *Williamſon, M.* 37 *G.* 3. *Page* 32

2. Coſts are due to the plaintiff who recovers treble damages in an action on ſtat. 29 *El. c.* 4. againſt the ſheriff for taking more than the fee allowed by that ſtatute on levying under an execution againſt the plaintiff's goods. *Tyte* v. *Glode, E.* 37 *G.* 3. 267

3. Wherever an action is given to the party grieved by any act ſince the ſtat. of *Glouceſter*, he is entitled to coſts if he ſucceed, though he had no remedy before ſuch act. *Ib.* 268

4. If an executor or adminiſtrator bring trover, ſtating the converſion after the teſtator's or inteſtate's death, and fail, he muſt pay the coſts. *Bollard* v. *Spencer, T.* 37 *G.* 3. 358

5. The ſtat. 8 & 9 *W.* 3. *c.* 11., giving coſts in all *ſuits* of ſcire facias, does not extend to a ſcire facias to repeal a patent proſecuted in the name of the king. *R.* v. *Miles, T.* 37 *G.* 3. 367

6. The defendants in ſeveral actions on a policy of inſurance paid money into court, which the plaintiff took out without taxing the coſts at that time: afterwards they entered into the common conſolidation rule, and the plaintiff was nonſuited in the action that was tried: ruled that the plaintiff was not entitled to the coſts in any of the actions up to the time of paying the money into court. *Burſtall* v. *Horner, T.* 37 *G.* 3. 3 2

7. Juſtices of the peace at the Quarter-Seſſions have no authority to order the coſts of a proſecution for a miſdemeanor carried on under the direction of magiſtrates to be allowed out of the county rates. *R.* v. *The Inhabitants of the Weſt Riding of Yorkſhire, M.* 38 *G.* 3. 377

8. To entitle an officer defendant to double coſts under the ſtat. 7 *Jac.* 1. *c.* 5. there muſt be a certificate of the judge who tried the cauſe (which may be granted either at the trial or afterwards) that the defendant was ſuch an officer and that the action was brought againſt him for ſomething done by him in the execution of that office. *Harper* v. *Carr, M.* 38 *G.* 3. *Page* 448

9. By a canal act the company were authoriſed to take certain lands for the purpoſes of the act on making certain payments either by annual rents or ſums in groſs, and the perſons from whom the land was to be taken were empowered to diſtrain the goods of the company even off the premiſes in caſe of non-payment of ſuch ſums. An avowant ſtating a diſtreſs under this act of parliament is not entitled on obtaining a verdict to double coſts under the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 22. *Leominſter Canal Company* v. *Norris, H.* 38 *G.* 3. 500

10. In treſpaſs quare clauſum fregit if the defendant plead not guilty and a juſtification which does not make title to the land, upon which iſſues are joined which are found for the plaintiff with damages under 40*s.* ſtill the plaintiff is entitled to full coſts. *Peddell* v. *Kiddle, E.* 38 *G.* 3. 659

COVENANT.

1. In covenant on a charter-party of affreightment in which defendant covenanted to pay ſo much for freight for "goods delivered at "*A.*," freight cannot be recovered pro ratâ iteneris if the ſhip be wrecked at *B.* before her arrival at *A.*, though the defendant accepted his goods at *B.* *Cooke* v. *Jennings, M.* 38 *G.* 3. 381

2. In an action of covenant for rent on an indenture brought by the aſſignees of the leſſor (a bankrupt), the leſſee cannot plead that the leſſor nil habuit in tenementis. *Parker and others, Aſſignees of Steel a Bankrupt,* v. *Manning, E.* 38 *G.* 3. 537

3. *A.* ſold a ſhip to *B.*, with a covenant that he had a good title, though in fact he had none. Afterwards *A.* became a bankrupt, and *B.* ſuſtained damage by paying the value of the ſhip to the true owner; held in an action on the covenant by *B.* againſt *A.*, ſtating the ſpecial damage, that *A.*'s certificate was no bar. *Hamond* v. *Toulmin, E.* 38 *G.* 3. 612

4. The leſſee of a coal-mine covenanted to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhould ſell for at the pit's mouth*: held that he was not liable to pay any part of the money produced by the ſale of the coals elſewhere. *Gerrard* v. *Cliſton*, in Error, *T.* 38 *G.* 3. *Page* 676

COUNTY PALATINE,

See TRIAL, No. 2.

COUNTY RATE,

See CORONER.

1. Juſtices of the peace at the Quarter-Seſſions have no authority to order the coſts of a proſecution for a miſdemeanor carried on under the direction of magiſtrates to be allowed out of the county rates. *R.* v. *The Inhabitants of the Weſt Riding of Yorkſhire*, *M.* 38 *G.* 3. 377

COURT ROLL,

See INSPECTION, No. 1.

CURTESY,

See TENANT IN TAIL, No. 2.

DAMAGES,

See NEW TRIAL, No. 1.

DEATH OF DEFENDANT,

See JUDGMENT, No. 1.

DEED,

See LIMITATION.

DESCENT,

See SEISIN, No. 1.

1. *A.* ſeiſed in fee of a copyhold of inheritance by deſcent ex parte maternâ ſurrendered to the uſe of himſelf for life, remainder to ſuch perſons and for ſuch eſtates as he ſhould by deed or will atteſted by three witneſſes appoint, remainder in default of appointment to himſelf in fee: afterwards be mortgaged and ſurrendered to the uſe of the mortgagee in fee; who upon repayment of the principal and intereſt ſurrendered to the mortgagor: held that the line of deſcent was thereby broken, and that the eſtate deſcended to the paternal heir. *Doe* d. *Harman* v. *Morgan*, *H.* 37 *G.* 3. 103
2. A feoffment and refeoffment break the line of deſcent. *ib.* 105

DEVISE,

See LIMITATION.

1. After a deviſe to an infant in ventre ſa mere for life in caſe it ſhould be a ſon, remainder to ſuch iſſue male or the deſcendants of ſuch iſſue male of ſuch child as at the time of his death ſhould be his heir at law, and in caſe at the time of the death of ſuch child there ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue male then living, or in caſe ſuch child ſhould not be a ſon, then over; the limitation over is not too remote to take effect. *Long* v. *Blackall*, *H.* 37 *G.* 3. *Page* 100
2. An executory deviſe is good, if it muſt neceſſarily happen within a life or lives in being and twenty-one years and the fraction of another year allowing for the time of geſtation. *ib.* 102
3. Deviſe to *A.* and her heirs and if ſhe died without iſſue then ſhe was enabled to diſpoſe of the eſtate by will or deed, and for want of ſuch iſſue and direction &c. then to the deviſor's right heirs; held that *A.* who had iſſue took an eſtate-tail. *Doe* d. *Neville* v. *Rivers*, *E.* 37 *G.* 3. 276
4. *A.* having three daughters *B.*, *C.*, and *D.*, by will gave a ſmall legacy to *B.* and *C.*, and then gave a leaſehold eſtate to *D.* "but if "ſhe died *without having* child or children" then "to *B.* and after her to her child or "children;" *D.* had a child who died in her life-time; held that *D.* took the abſolute intereſt in the term, and conſequently that ſhe might diſpoſe of it by will. *Weakley* d. *Knight* v. *Rugg*, *T.* 37 *G.* 3. 322
5. Where after a deviſe to one for life the deviſor limited the eſtate to truſtees *and their heirs* in truſt to preſerve contingent remainders and to permit the tenant for life to take the profits, with remainder over on his deceaſe; and he afterwards gave other eſtates for lives with ſeveral remainders over, and after each eſtate for life he interpoſed the ſame eſtate to truſtees and their heirs: held that this ſhewed his intent to be, that the eſtates to the truſtees ſhould be confined to the lives of the ſeveral tenants for lives, and conſequently that thoſe in remainder took legal eſtates, there being no other circumſtances in the will to ſhew a contrary intent. *Doe* d. *Compere* v. *Hicks*, *M* 38 *G.* 3. 433

6. *A.* ſeiſed in fee, by marriage articles agreed to ſettle his eſtates ſo as to ſecure his intended wife's jointure, and the portions of younger children, and ſubject thereto upon his eldeſt ſon in tail male; then he deviſed thoſe eſtates in fee *in caſe he had no iſſue*, and ſubject to any jointure he might make; and afterwards conveyed them by leaſe and releaſe to truſtees, and their heirs, in purſuance of the articles, in truſt for himſelf in fee, till the marriage, and afterwards for the various purpoſes of the marriage articles, and for default of iſſue of the marriage, and ſubject to a term for ſecuring the jointure, to the uſe of himſelf in fee: he afterwards married and died without iſſue: held that the deed of ſettlement whereby he departed with the whole eſtate deviſed operated as a revocation of the will, though he took back a fee by the ſame inſtrument, and though it was conſiſtent with the proviſions of the will: and that it made no difference that with reſpect to one of the eſtates the conveyance in fee to the truſtees was merely for the purpoſe of creating a term to ſecure his wife's jointure, and that the ſettlor took back the fee again ſubject to that term. *Goodtitle* d. *Holford* v. *Otway*, *M.* 38 *G.* 3. *Page* 399

7. *A.* by will deviſed *all his freehold and copyhold lands*, &c. in truſt for certain purpoſes, and afterwards purchaſed new lands; and then made a codicil, whereby after reciting that he had deviſed all his freehold and copyhold to the truſtees named, he revoked the ſame ſo far as related to two of the truſtees named, and deviſed his *ſaid* lands &c. to the other truſtees upon the ſame truſts; and concluded with declaring the codicil to be part of his will. Held that ſuch a republication of the will would not operate to paſs the after-purchaſed lands. Lady *Strathmore* v. *Bowes*, *H.* 38 *G.* 3. 482

8. *A.* by will bequeathed to his wife (beſides ſome other legacies) a leaſehold eſtate at *N.* for her life, and a leaſehold eſtate at *W.* to *B.*: and by his codicil he directed that the bequeſts to his wife in his will ſhould be in full of all claims ſhe ſhould be entitled to on his real or perſonal eſtate except the eſtate for life of his wife in the premiſes at *W.*: held that the wife was not thereby entitled to the eſtate at *W.*; it being clear that *W.* was put by miſtake for *B.* *Skerratt* v. *Oakley*, *H.* 38 *G.* 3. *Page* 492

9. Under a deviſe to *A.* and the heirs of her body for ever as tenants in common and not as joint-tenants, and in caſe *A.* die before twenty-one or without leaving iſſue of her body then to *B.*, held that *A.* took an eſtate-tail. *Doe* d. *Candler* v. *Smith*, *E.* 38 *G.* 3. 531

10. Under a bequeſt of a term of years "to "*A.* and the heirs of his body and to their "heirs and aſſigns for ever, but in default "of ſuch iſſue then after his deceaſe to *B.* "and his heirs," the limitation over to *B.* is good by way of executory deviſe. *Wilkinſon* v. *South*, *E.* 38 *G.* 3. 555

11. Under a deviſe to *T. F.* and his heirs, for ever, and in caſe he ſhould depart this life *and leave no iſſue*, then to *E. M.* and *S.* or the ſurvivor or ſurvivors of them ſhare and ſhare alike, the deviſe to *E. M.* and *S.* is a good executory deviſe. *Roe* d. *Sheers and others* v. *Jeffery and others*, *E.* 38 *G.* 3. 589

12. *A.* deviſed two houſes to his wife for life, and willed that on payment of a ſum of money to the wife by *B.* (one of his ſons) *B.* ſhould ſhare equally alike with the reſt of his brothers and ſiſters *C.*, *D.*, and *E.*; and if any of his children ſhould die, then the ſhare of him or her ſhould go amongſt the ſurvivors: held that the children *B.*, *C.*, *D.*, and *E.* took only eſtates for life under the will. *Goodtitle* d. *Richardſon* v. *Edmonds*, *E.* 38 *G.* 3. 635

13. A deviſe of lands to truſtees and their heirs upon truſt to permit a feme covert to receive and take the rents and profits during her life, for her ſole and ſeparate uſe, and after her deceaſe to the uſe of the firſt and other ſons of her body, then to the daughters as tenants in common, with other like limitations to other femes coverts, veſts the legal eſtate in the truſtees. *Horton* v. *Horton*, *E.* 38 *G.* 3. 652

DISCONTINUANCE.

1. Though the plaintiff diſcontinue on the common rule on payment of coſts, he is not liable to an attachment for non-payment. *Stokes* v. *Woodeſon*, *M.* 37 *G.* 3. 6

DISTRESS,

See COSTS, No. 9. LANDLORD AND TENANT, No. 3, 4, 5. OFFICER, No. 1.

1. One warrant of diſtreſs for the amount of ſeveral duties impoſed by different acts of parliament, each giving a power of diſtreſs, is legal. *Patchett* v. *Bancroft*, *Trin.* 37 *G.* 3. *Page* 367
2. The judgment of the commiſſioners of land-tax on appeal is concluſive in an action of treſpaſs brought againſt the officer for levying under a warrant of diſtreſs. *ib.*
3. A tenant holding over after the expiration of his term cannot diſtrain the landlord's cattle which were put upon the premiſes by way of taking poſſeſſion. *Taunton* v. *Coſtar*, *M.* 38 *G.* 3. 431

E.

EJECTMENT,

See PRESUMPTION, No. 1, 2. LANDLORD AND TENANT. NOTICE TO QUIT.

1. In ejectment the legal title muſt prevail. *Goodtitle* d. *Jones* v. *Jones*, *M.* 37 *G.* 3. 47
2. The court will not ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor on the latter paying principal intereſt and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee. *Goodtitle* d. *Tayſum* v. *Pope*, *E.* 37 *G.* 3. 185
3. The leſſor of the plaintiff in ejectment muſt prove the defendant in poſſeſſion of the premiſes which he ſeeks to recover, although the defendant has entered into the general conſent rule to confeſs leaſe entry and ouſter. *Goodright* d. *Balch* v. *Rich*, *T.* 37 *G.* 3. 327
4. Where tenant for life levies a fine, though it is no bar to thoſe in remainder, yet it ſeems that a remainder-man muſt make an actual entry before he can maintain an ejectment. *Doe* d. *Compere* v. *Hicks*, *M.* 38 *G.* 3. 433
5. And where an entry is neceſſary the demiſe muſt be laid after it. *ib.*
6. In ejectment againſt ſeveral tenants, the name of each was prefixed to the notice ſerved on him; and held only one rule was neceſſary on motion for judgment againſt the caſual ejector. *Roe* d. *Burlton* v. *Roe*, *H.* 38 *G.* 3. *Page* 477
7. An actual entry is neceſſary to avoid a fine, and the party ſo avoiding it cannot lay his demiſe in an ejectment, or recover the meſne profits that accrued before ſuch entry. *Lee Compere* v. *Hicks*, *T.* 38 *G.* 3. 727

ERROR.

1. In an action on the 1 *Jac.* 1. *c.* 15. *ſ.* 11 & 12. and 5 *G.* 2. *c.* 30. *ſ.* 29. by aſſignees of a bankrupt againſt one convicted of falſe ſwearing to a debt under the commiſſion, to recover double the ſum ſo ſworn to, it is ſufficient to ſtate the conviction of the defendant on the indictment, and no advantage can be taken of any defect in that judgment but by writ of error. *Holmes and others*, *Aſſignees of Brook a Bankrupt*, v. *Walſh*, *H.* 38 *G.* 3. 458
2. So the Court will not quaſh a return to a mandamus (which directed an inferior Court to give judgment on an indictment) merely becauſe it ſtates an erroneous judgment given below: but a writ of error muſt be brought to reverſe that judgment. *R.* v. *The Juſtices of the W. R. of Yorkſhire*. 467

EVIDENCE,

See INFORMATION, No. 4, 5. PLEADING, No. 5, 6. TRESPASS, No. 2. WITNESS.

1. A bill in chancery is no evidence of the facts contained in it, not even of thoſe on which the prayer of relief is founded. *Doe* d *Bowerman* v. *Sybourn*, *M.* 37 *G.* 3. 2
2. Except in the inſtance of a bill filed by an anceſtor, which may be evidence of a family pedigree therein ſet forth. *Taylor* v. *Cole*, *cor.* Ld. *Kenyon*, *Hil.* 1789. cited *ib.* n. (*a*).
3. A recovery in ejectment againſt the wife cannot be given in evidence in an action againſt the huſband and wife for meſne profits. *Denn* v. *White*, *H.* 37 *G.* 3. 112
4. In an action of treſpaſs againſt the ſheriff for the wrongful act of a bailiff, it is not enough (in order to affect the ſheriff) to prove that he is a general bailiff, and had given a bond of indemnity to the ſheriff as ſuch, and to prove a copy of the warrant under which he entered and ſeized the plaintiff's goods: but the privity between the

the bailiff and the ſheriff muſt be eſtabliſhed in the particular tranſaction on the beſt evidence, by proving the original warrant of execution from the ſheriff to the bailiff, or at leaſt by proving notice to produce it, ſo that in caſe of its not being produced ſecondary evidence of its contents may be let in. *Drake* v. *Sykes*, Bart. *H.* 37 *G.* 3. *Page* 113

5. Parol evidence may be let in to explain a latent ambiguity in a will or codicil. *Lord Walpole* v. *Earl Cholmondeley*, *H.* 37 *G.* 3. 138

6. But where the deviſor made one will in 1752, and another in 1756, without diſpoſing of his perſonalty, and by a codicil (reciting that by his *laſt will dated in* 1752 he had made no diſpoſition of his perſonalty) diſpoſed of his perſonalty and appointed executors, it was ruled that there was no latent ambiguity ſo as to let in parol evidence to ſhew that the teſtator intended by the codicil to confirm the will of 1756, and not to republiſh that of 1752. *ib.*

7. The plaintiff's agent ſhewed to the defendant, an underwriter, the captain's proteſt containing an account of the loſs of the ſhip inſured, demanding payment: held that this did not entitle the defendant to read the proteſt in evidence in an action on the policy. *Senat* v. *Porter*, *H.* 37 *G.* 3. 158

8. An inſtrument executed abroad and witneſſed by a foreigner reſiding there may be proved by evidence of the handwriting of the witneſs and of the contracting party, but not by the latter alone. *Barnes* v. *Trompowſky*, *E.* 37 *G.* 3. 265

9. Every inſtrument, to the ſigning of which there is a witneſs, ſhould be proved by that witneſs, if living, or by proving the handwriting of the witneſs in caſe he is domiciled in a foreign country or in caſe he cannot be found ſo that there may be a preſumption of his death. *Ib.* 266

10. In treſpaſs the defendant may give evidence of title under the general iſſue. *Dodd* v. *Kyffin*, *T.* 37 *G.* 3. 354

11. In treſpaſs for breaking and entering the plaintiff's cloſe and taking his goods, the defendant may juſtify under a ſufficient legal proceſs, if he had it in fact at the time, although he declared then that he entered for another cauſe. *Crowther* v. *Ramſbottom*. *E.* 38 *G.* 3. 654

12. The defendant may give in evidence the declarations or admiſſions of the plaintiff on the record to defeat the action, although ſuch plaintiff appear to be only a truſtee for a third perſon. *Bauerman* v. *Radenius*, *T.* 38 *G.* 3. *Page* 663
Craib v. *D'Aeth*, *T.* 30 *G.* 3. 670, *n.*

EXCISE.

1. After the duties of exciſe are charged on waſh made for extracting ſpirits by 26 *G.* 3. *c.* 73., if any part of the waſh is loſt by accident, the manufacturer cannot be relieved from the reſpective proportion of the duty, as for an overcharge. *R.* v. *B. Sikes*, *M.* 37 *G.* 3. 56

EXCOMMUNICATION.

1. A writ de excommunicato capiendo ſtating that the defendant was excommunicated in a cauſe of "defamation and ſlander merely ſpiritual" is good. *R.* v. *Payton*, *H.* 37 *G.* 3. 153
2. If the ſentence of the greater, inſtead of the leſſer, excommunication be pronounced it is only a ground of appeal: this court will not quaſh a writ de excommunicato capiendo for that objection. *ib.*
3. It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation. *ib.*

EXECUTION,

See JUDGMENT, No. 1.

1. If a plaintiff conſent to the defendant's being diſcharged out of execution on his undertaking to pay at a future day, he cannot afterwards ſue out any execution on that judgment in the event of the defendant's not fulfilling his undertaking. *Tanner* v. *Hague*, *M.* 38 *G.* 3. 420

EXECUTOR AND ADMINISTRATOR,

See COSTS, No. 4.

1. If an arbitrator under a reference between *A.* and *B.* adminiſtrator award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-

non-payment. *Worthington* v. *Barlow*, *Adminiſtratrix*, *M.* 38 *G.* 3. *Page* 453

EXECUTORY DEVISE,
See DEVISE, No. 10, 11.

F.

FACTOR,
See SET-OFF, No. 1.

FARM.
See GRANT, No. 1.

FEES,
See HOLIDAYS, No. 1.

FEME,
See BARON AND FEME.

FINE.

1. Where a tenant for life levies a fine, though it is no bar to thoſe in remainder, yet it ſeems that a remainder-man muſt make an actual entry before he can maintain an ejectment. *Doe* d. *Compere* v. *Hicks*, *M.* 38 *G.* 3. 433

2. An actual entry is neceſſary to avoid a fine, and the party ſo avoiding it cannot lay his demiſe in an ejectment, or recover the meſne profits that accrued before ſuch entry. *Lee Compere* v. *Hicks*, *T.* 38 *G.* 3. 727

FOREIGN SENTENCE,
See INSURANCE, No. 13.

FORFEITURE,
See PLEADING. No. 5, 6.

FRAUDS,
See SETTLEMENT—*by renting* 10*l.* *a-year*, No. 3.

1. A ſale of goods for more than 10*l.* by ſample in one place to be afterwards delivered at another is within the ſtatute of Frauds, if no part of the goods contracted for were delivered, nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing. *Cooper* v. *Elſton*, *M.* 37 *G.* 3. 14

2. The ſtatute of Frauds, 29 *Car.* 2. *c.* 3. *ſ.* 13. 15., was made to protect *purchaſers*. *Bragner* v. *Langmead*, *M.* 37 *G.* 3. *P.* 20

FRAUDS (*Statute of*).

1. A parol promiſe to pay the debt of another and alſo to do ſome other thing is void by the ſtatute of Frauds. *Chater* v. *Beckett*, *E.* 37 *G.* 3. 201

FREIGHT.

1. In covenant on a charter-party of affreightment in which defendant covenanted to pay ſo much for freight for "goods delivered at *A.*," freight cannot be recovered *pro ratâ iteneris* if the ſhip be wrecked at *B.* before her arrival at *A.*, though the defendant accepted his goods at *B.* *Cook* v. *Jennings*, *M.* 38 *G.* 3. 381

2. The inſurer on freight agreed to return part of the premium "if the ſhip ſailed "with convoy *and arrived*:" held that the aſſured were entitled to that return the ſhip having ſailed with convoy and arrived, though ſhe had been captured and recaptured, and the aſſured had been obliged to pay for ſalvage. *Aguilar* v. *Rodgers*, *M.* 38 *G.* 3. 421

G.

GAME LAWS,
See INFORMATION, No. 2, 3, 4.

GAMING,
See ABATEMENT, No. 3.

GRANT.

1. By a grant of all tithes ariſing out of or in reſpect of *farms*, *lands* &c. the tithes ariſing out of and in reſpect of rights of common appurtenant to ſuch farms or lands will paſs. *Lord Gwydir* v. *Foakes*, *E.* 38 *G.* 3. 641

GROATS,
See INSOLVENT DEBTOR, No. 1.

GUARDS,
See BILLETING, No. 1.

H.

HABEAS CORPUS,

See BAIL, No. 5.

1. The maſter cannot ſue out a habeas corpus to bring up an apprentice impreſſed to be diſcharged, though the apprentice himſelf may. *R.* v. *Edwards*, *T.* 38 *G.* 3. *P.* 745
See further. *Impreſs*, No. 3.

HEIR,

See DESCENT, No. 1, 2.

HIGHWAYS,

See APPEAL, No. 1, 2.

1. The magiſtrates are not bound to appoint ſurveyors of the highways from the liſt of perſons returned to them under ſtat. 13 *G.* 3. *c.* 78. if in their opinions the perſons named in the liſt are not qualified: but they may appoint other perſons of the pariſh who are qualified. *R.* v. *Baldwin*, *H.* 37 *G.* 3. 169
2. Under a turnpike act the truſtees had power to turn roads through private grounds, making ſatisfaction to the owners; and if they could not agree, they were enabled on giving notice to the owners to ſummon a jury to aſcertain the damage and to order ſuch ſum ſo aſcertained to be paid to the owners: an inquiſition of the jury and an order of the truſtees under the above act were quaſhed, becauſe it did not appear on the face of the proceedings that *any notice* had been given to the owners of the land. *R.* v. *Bagſhaw*, *T.* 37 *G.* 3. 363

HOLIDAYS.

1. The 29th of *May* is not a holiday in any of the law offices, and conſequently no officer can take an extraordinary fee for buſineſs done on that day. *Pater* v. *Croome*, *T.* 37 *G.* 3. 336
2. The only allowed holidays are *Candlemas*, the *Aſcenſion*, and *St. John the Baptiſt*. *ib.*

HOPS,

See TITHES, No. 1.

HUNDRED.

1. The hundred are not liable in an action for damages brought by the perſon injured by a mob beginning to pull down his houſe, &c., unleſs the riot be of ſuch a kind as to amount to felony within the 1 *G.* 1. *ſt.* 2. *c.* 5. *Reid* v. *Clarke and another*, *H.* 38 *G.* 3. *Page* 496
2. In that caſe the breaking of the plaintiff's windows by a mob becauſe he would not illuminate his houſe on a particular occaſion was held not to be within the act. *ib.*

J.

JAMAICA,

See ASSUMPSIT, No. 2.

JEOFAILS.

1. In an action on the 34 *G.* 3. *c.* 23. for pirating a pattern for printing callico the omiſſion of an averment in the declaration, "that the day of firſt publiſhing the pattern was printed at each end of the piece of callico," (which together with the name of the proprietor is required by that ſtatute, the monopoly being limited for three months from the day of firſt publiſhing the pattern,) was holden to be aided by verdict; it being ſtated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the firſt publiſhing thereof, and while the plaintiffs were entitled to have the ſole right of printing the ſame*, &c. *Macmurdo* v. *Smith*, *H.* 38 *G.* 3. 518
2. If a local action be brought and tried in a wrong county, the defect is aided after verdict by 16 & 17 *Car.* 2. *c.* 8. *The Mayor &c. of London* v. *Cole*, *E.* 38 *G.* 3. 583

IMPARLANCE,

See PRACTICE, No. 19.

IMPRESS.

1. The ſtat 6 & 7 *W.* 3. *c.* 18. *ſ.* 19. allowing the maſter of a collier to nominate two ſeamen free from being impreſſed is no longer in force. *Ex parte Gallile*, *T.* 38 *G.* 3. 673

2. If an apprentice be impreſſed into the ſea-ſervice, the maſter cannot ſue out an *habeas corpus* to bring him up to be diſcharged, though the apprentice may. *R.* v. *Edwards*, *T.* 38 *G.* 3. *Page* 745

3. But the Lord Chief Juſtice may iſſue a warrant to bring him up on the application either of the maſter or the apprentice. *ib.*

INDICTMENT,

See PLEADING. PERJURY, No. 1, 2, 3. CERTIORARI, No. 1.

1. An indictment or information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is falſe. *R.* v. *Burks*, *M.* 37 *G.* 3. 4

2. On an indictment for a nuiſance in erecting a wall acroſs a road (not for *continuing* the nuiſance) it is not neceſſary to adjudge that the nuiſance be abated. *Semb.* *R.* v. *the Juſtices of the W. R. of Yorkſhire*, *H.* 38 *G.* 3. 467

INFORMATION,

See INDICTMENT.

1. The Court will grant a rule *niſi* for a criminal information at the end of a term againſt a magiſtrate for malpractices *during the term*, but not for any miſconduct before the term. *R.* v. *C. Smith*, *M.* 37 *G.* 3. 80

2. It is no objection to an information on the game laws that it is not *qui tam*. *R.* v. *W. Lovet*, *H.* 37 *G.* 3. 152

3. On an information on the game laws, charging the defendant with keeping and uſing a dog and alſo a gun on the ſame day, he can only be convicted in one penalty. *ib.*

4. If the evidence be given on the ſame day that the defendant appeared and pleaded, it will be intended that the evidence was given in his preſence. *ib.*

5. A magiſtrate ſhould ſtate all the evidence in the conviction, and not merely the reſult of it. *ib.*

6. When a ſtatute creates a penalty, and ſays that one moiety ſhall be to the uſe of the king and the other to a common informer, the king may ſue for the whole by an information filed in *B. R.* by the Attorney General, unleſs a common informer has commenced a *qui tam* ſuit for the penalty. *R.* v. *Hymen*, *E.* 38 *G.* 3. *Page* 536

INQUIRY, *Writ of.*

See PRACTICE, No. 16, 17, 18.

INSOLVENT DEBTOR.

1. A note for groats muſt be ſigned by all the creditors: if it be not, the defendant is entitled to be diſcharged, though he has received ſome payments under it. *R.* v. *Wilkinſon*, *H.* 37 *G.* 3. 156

2. The inſolvent act 34 *G.* 3. *c.* 69. does not diſcharge the perſon of an inſolvent (who is entitled to the benefit of that act) from the payment of the arrears of an annuity becoming due after his diſcharge on a covenant made before the act. *Marks* v. *Upton*, *T.* 37 *G.* 3. 305

3. Inſolvent debtors petitioning under the Lords' act 32 *G.* 2. and ſubſequent acts for their further relief ſhall be brought into court during term time on *Mondays* and *Thurſdays* only. *Reg. Gen.* *H.* 37 *G.* 3. 454

4. The notes for the weekly payments of 3*s.* 6*d.* under the Lords' act muſt be ſtamped. *Pitman* v. *Haynes*, *H.* 38 *G.* 3. 530

Sed contra in *Tekell* v. *Caſey*, *T.* 38 *G.* 3. 670

INSPECTION OF COURT ROLLS.

1. A freehold tenant of a manor has no right to inſpect the court rolls, unleſs there is ſome cauſe depending in which his right may be involved. *R.* v. *Allgood*, *T.* 38 *G.* 3. 746

INSURANCE,

See EVIDENCE, No. 7.

1. A ſailor cannot inſure either his wages, or any thing that he is to receive at the end of the voyage in lieu of wages, *e. g.* ſlaves. *Webſter* v. *De Taſtet*, *H.* 37 *G.* 3. 157

2. Nor can he recover the value of ſuch thing in an action againſt his agent for negligence in not procuring ſuch inſurance. *ib.*

3. The aſſured cannot recover on a policy of aſſurance, unleſs they equip the ſhip with every thing

thing neceſſary to her navigation during the voyage; and therefore they cannot recover if there be no pilot on board. *Law* v. *Hollingſworth*, *H.* 37 *G.* 3. *Page* 160

4. Whether it be neceſſary to the right of the aſſured to recover that, in navigating up the *Thames*, there ſhould be a pilot on board qualified according to the directions of the ſtat. 5 *G.* 2. *c.* 20.? *Qu.* *ib.*
5. The aſſured cannot recover on a policy of inſurance unleſs they make a full diſcloſure of all the circumſtances of the intended voyage, even with reſpect to the track the ſhip intends to take. *Middlewood* v. *Blakes*, *H.* 37 *G.* 3. 162
6. By ſtat. 31 *G.* 3. *c.* 54. *ſ.* 7. for regulating the *African* ſlave-trade it is neceſſary that the certificate of the captain's having ſerved as that act requires ſhould be atteſted by the owner or owners of the ſhip or ſhips in which the ſervice was performed: and the aſſured cannot recover on a policy on a ſhip whoſe captain has not ſuch a certificate. *Farmer* v. *Legg*, *E.* 37 *G.* 3. 186
7. If an inſurance be effected on fruit, and the policy contain the uſual memorandum "corn fruit &c. warranted free from average unleſs general or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the underwriters are liable for an average loſs ariſing from the perils of the ſeas, though no part of the loſs ariſe from the act of ſtranding. *Burnett* v. *Kenſington*, *E.* 37 *G.* 3. 210
8. A company of ſhip-owners engaged to inſure each other's ſhips, and covenanted *ſeverally*, and not jointly, to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, but in caſe of the inſolvency of any one of the members, all the others were to be reſponſible: held that this contract was void by the ſtat. 6 *G.* 1. *c.* 18. *ſ.* 12. *Lees* v. *Smith*, *T.* 37 *G.* 3. 338
9. If the credit of any company (except the Royal Exchange Aſſurance Company and the *London* Aſſurance Company) be in any event pledged in a contract of inſurance, the contract is void by that ſtatute. *Ib.* 341
10. The inſurer on freight agreed to return part of the premium "if the ſhip ſailed with convoy and *arrived*:" held that the aſſured were entitled to that return, the ſhip having ſailed with convoy and arrived, though ſhe had been captured and recaptured, and the aſſured had been obliged to pay for ſalvage. *Aguilar* v. *Rodgers*, *M.* 38 *G.* 3. *Page* 421
11. A deviation of a veſſel from the voyage inſured through the ignorance of the captain or from any other motive not fraudulent, though it avoids the policy, does not conſtitute an act of barratry. *Phyn* v. *Royal Exchange Aſſurance Company*, *H.* 38 *G.* 3. 505
12. In an action on a policy of inſurance on goods warranted *American* on board a ſhip from *London* to *Virginia*, a ſentence of a foreign court, which after reciting that "foraſmuch as the true deſtination of the veſſel was for the *Engliſh* iſlands, having been hired and loaded at *London*, and having on board eighty barrels of gunpowder, declares the ſhip and cargo a good prize," is not concluſive evidence againſt the warranty of neutrality; becauſe the ſpecial grounds aſſigned for the ſentence do not neceſſarily lead to ſuch a concluſion. *Calvert* v. *Bovill*, *H.* 38 *G.* 3. 523
13. By the ſentence of a *French* court of admiralty it appeared that the ſhip inſured, *warranted American*, had been condemned as enemy's property for want of having on board a *role d'equipage* or liſt of the crew, ſuch as is required by a marine ordinance of *France*, and adjudged by the court there to be requiſite within the meaning of the treaty of commerce between *France* and *America*; held to be concluſive evidence againſt the warranty of neutrality, though in fact the ſhip was *American*. *Geyer* v. *Aguilar*, *T.* 38 *G.* 3. 681
14. A warranty in a policy of inſurance that the ſhip is *American* property, means that the ſhip is entitled to all the privileges of an *American* flag; and if ſhe have no paſſport on board (which is required by treaty between *France* and *America*) the warranty is not complied with, and the aſſured cannot recover againſt the underwriter; though in fact the ſhip ſuffer no inconvenience in the voyage from the want of the paſſport. *Rich* v. *Parker*, *T.* 38 *G.* 3. 705

INTEREST,

See BOND, No. 2.

JOINT AND SEVERAL,
See AWARD, No. 6.

JUDGMENT.

1. A judgment ſigned in any part of the term or the ſubſequent vacation relates back to the firſt day of the term, notwithſtanding the death of the defendant before judgment actually ſigned; and an execution againſt the defendant's goods may be taken out upon it, teſted the firſt day of the term. *Bragner* v. *Langmead*, *M.* 37 *G.* 3. *Page* 20

2. But if the execution be not teſted until after the defendant's death, it is irregular. *Ib.* 24

JUDGMENT *as in Caſe of a Nonſuit.*

1. The plaintiff in a *qui tam* action on the ſtat. 7 *Geo.* 2. *c.* 8. withdrew his record, becauſe the broker who negotiated the illegal contract for ſtock refuſed to give evidence for fear of ſubjecting himſelf to a penalty on the ſame act: this was holden to be a ſufficient reaſon for diſcharging a rule for judgment as in caſe of a nonſuit for not proceeding to trial, though the witneſs's liability to be ſued would not be removed until after the three ſucceeding terms. *Raques q. t.* v. *Spicer*, *H.* 37 *G.* 3. 178

JURISDICTION,
See HIGHWAYS, No. 2.

JUSTICE OF PEACE.

1. No action can be brought againſt a juſtice of the peace for any act done by him in that character without giving him a month's notice of the *writ* or *proceſs* intended to be ſued out as well as of *the cauſe of action*. *Lovelace* v. *Curry*, *E.* 38 *G.* 3. 631

2. Notice of *an action on the caſe for falſe impriſonment and aſſault* was held not ſufficient to ſupport *an action of treſpaſs and falſe impriſonment. Per Yates* J. *Strickland* v. *Ward*, *Wincheſter Summer Aſſizes* 1767. *ib.* n.

L.

LAND,
See GRANT, No. 1.

LANDLORD AND TENANT,
See LEASE. NOTICE TO QUIT.

1. If a tenant for life, under a limited power of leaſing, grant a leaſe exceeding his power, the leaſe is void and not capable of confirmation by the remainder-man. *Doe* d. *Martin* v. *Watts*, *H.* 37 *G.* 3. *Page* 83

2. But if the remainder-man accept rent as rent after the death of the tenant for life, it is an admiſſion that the defendant is his tenant, and the tenant is entitled to notice to quit. *ib.*

3. Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law unleſs he demand the rent on the day when it becomes due; nor under the ſtat. 4 *Geo.* 2. *c.* 28. *ſ.* 2. if there be a ſufficient diſtreſs on the premiſes. *Doe* d. *Forſter* v. *Wandlaſs*, *H.* 37 *G.* 3. 117

4. A ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the goods diſtrained, and afterwards the outlawry was reverſed; held that the officer was liable to pay the produce of the goods to the landlord in an action for money had and received. *St. John's College*, *Oxford*, v. *Murcott*, *E.* 37 *G.* 3. 259

5. The goods of a tenant are liable for a year's rent, notwithſtanding an outlawry in a *civil ſuit*. *ib.*

6. A tenant holding over after the expiration of his term cannot diſtrain the landlord's cattle which were put upon the premiſes by way of taking poſſeſſion. *Taunton* v. *Coſtar*, *M.* 38 *G.* 3. 431

7. The landlord has a right to enter on the expiration of the term, though if he do it with a ſtrong hand to diſpoſſeſs the tenant by force he may be indicted. *ib.*

8. If *B.* claiming under *A.* let lands for a year to *C.*, and die, and *A.* afterwards bring an ejectment againſt *C.*, *C.* cannot diſpute the title of *A.* *Barwick* d. *the Mayor and Aldermen of Richmond in Yorkſhire* v. *Thompſon*, *H.* 38 *G.* 3. 488

9. In an action of covenant for rent on an indenture brought by the aſſignees of the leſſor (a bankrupt) the leſſee cannot plead that the leſſor *nil habuit in tenementis*. *Parker and others, Aſſignees of Steel a Bankrupt*, v. *Manning*, *E.* 38 *G.* 3. *Page* 537

LEASE.

1. By a marriage ſettlement an eſtate was ſettled to the uſe of the wife for life, remainder to ſuch perſons and for ſuch eſtates as ſhe ſhould by deed or will atteſted by three witneſſes appoint, and for want of ſuch appointment reverſion to herſelf in fee. During her huſband's life ſhe made a will in purſuance of the power, deviſing the eſtate to *A.* in fee; after which ſhe and her huſband executed a leaſe of part of the ſettled eſtate to the defendant, not executed purſuant to the power; and after her huſband's death, ſhe received rent from the defendant. Held that ſuch leaſe was voidable only by her upon her huſband's death; and that her receipt of rent accruing afterwards was a confirmation of it againſt *A.* who claimed under her appointment by the will. *Doe* d. *Collins* v. *Weller*, *H.* 38 *G.* 3. 478

2. Where tenant for life grants a leaſe for years, which is void againſt the remainder-man, and the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created; yet this is with reference to the old term, and therefore a half year's notice to quit from the remainder-man ending with the old year is good. *ib.*

3. Under a power of leaſing for one, two, or three, lives, or for any term of years determinable on one, two, or three, lives, ſuch lands as were then demiſed for any ſuch term, lands are not included which were then held under a demiſe “ to *W.* and *G.* “ for 99 years, if *W.* and his widow and “ any eldeſt ſon living or in *ventre ſa mere* “ at the time of his (*W.*'s) death, or if “ no ſon any eldeſt daughter then living or “ *in ventre ſa mere*, or any or either of “ thoſe three, *viz.* of the ſaid *W.* and “ ſuch his wife ſon or daughter ſhould ſo “ long live, remainder to the ſaid *G.* and “ his widow ſon or daughter in the ſame “ manner;” of which deſcription of perſons five were in fact living at the time of the power reſerved, who were all entitled in ſucceſſion, three at a time, to come in under the leaſe: for under ſuch a general power the three lives muſt be certain and co-exiſting. *Doe* d. *Wyndham* v. *Halcombe*, *T.* 38 *G.* 3. *Page* 713

LIBEL,
See INDICTMENT, No. 1.

LIBERUM TENEMENTUM,
See EVIDENCE, No. 10.

LIMITATION,
See DEVISE.

1. By deed and fine an eſtate was limited to the uſe of the huſband for life, remainder to truſtees and their heirs during his life to preſerve contingent remainders, remainder to the wife for life, remainder to the truſtees and their heirs, (not ſaying during her life,) in truſt to ſupport the contingent uſes and eſtates thereinafter limited, remainder to the firſt and other ſons in tail, remainder to the wife in tail, remainder in default of iſſue to ſuch perſons and for ſuch eſtates as ſhe ſhould appoint &c.: held that the truſtees took a legal eſtate in fee after the determination of the wife's life-eſtate, and that all the ſubſequent limitations were truſt-eſtates; held alſo that an appointment by the wife to the uſe of the right heirs of the huſband could not unite with the antecedent life-eſtate of the huſband, but could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir. *Venables and Wiſe* v. *Morris*, *M.* 38 *G.* 3. 438 & 342

LITERARY PROPERTY,
See COPYRIGHT.

M.

MANDAMUS,
See AMENDMENT, No. 7.

1. The Court will not quaſh a return to a mandamus (which directed an inferior court to give judgment on an indictment) merely

becauſe it ſtates an erroneous judgment given below: but a writ of error muſt be brought to reverſe that judgment. *R.* v. *The Juſtices of the W. R. of Yorkſhire, H.* 38 *G.* 3. *Page* 467

2. In a mandamus to a company in a corporation to compel them to inrol indentures of apprenticeſhip it is ſufficient to ſtate generally that thoſe who have ſerved a free burgeſs &c. under indentures of apprenticeſhip, and whoſe indentures have been inrolled, are entitled to be admitted to their freedom; that *A. B.* had ſerved &c., that his indentures ought to have been inrolled on being tendered &c. and that they were tendered for that purpoſe, but that the defendants refuſed to inrol them. *R.* v. *The Wardens of the Coopers' Company of Newcaſtle upon Tyne, E.* 38 *G.* 3. 543

MESNE PROFITS.

1. An actual entry is neceſſary to avoid a fine, and the party ſo avoiding it cannot lay his demiſe in an ejectment or recover the meſne profits that accrued before ſuch entry. *Lee Compere* v. *Hicks, T.* 38 *G.* 3. 727

MILITIA.

1. An order for reimburſement under the 33 *Geo.* 3. *c.* 8. *ſ.* 3. made upon the pariſh for which a ſubſtitute in the militia ſerves, to indemnify the pariſh in which ſuch ſubſtitute's family ſhall have become chargeable and been relieved under an order of maintenance, muſt be made by the ſame magiſtrate and at the ſame time as the firſt order of maintenance; and notice of ſuch order of reimburſement ought to be ſerved upon the pariſh to be affected by it before they can be proceeded againſt criminally for diſobedience to it. *R.* v. *The Inhabitants of Ledbury, E.* 38 *G.* 3. 558

2. *Semble,* That if the ſubſtitute be ſworn and actually ſerve, his family are entitled to be relieved within the meaning of the 26 *Geo.* 3. *c.* 107. *ſ.* 24., and 33 *Geo.* 3. *c.* 8. *ſ.* 3. though the ſubſtitute were not previouſly approved by two deputy-lieutenants, or inrolled. *ib.*

MISNOMER,

See PLEADING, No. 8.

MORTGAGOR,

See DESCENT. EJECTMENT, No. 2. SHIP, No. 2.

N.

NAVIGATION.

1. By a navigation act the ſhares were declared to be veſted in the ſubſcribers their executors and *aſſigns,* with power to the ſubſcribers to aſſign their ſhares; and a committee to be appointed under the act were authoriſed to make calls on the proprietors of ſhares at ſuch time as they ſhould think fit; held that an original ſubſcriber is not liable for any call made by the committee after aſſigning his ſhare. *The Huddersfield Canal Company* v. *Buckley, M.* 37 *G.* 3. *Page* 36

2. The ſame act empowered the company to ſue for calls &c. "by action of debt *or on the caſe*:" it was ruled that an action on the caſe in tort lay. *ib.*

NEW TRIAL.

1. In an action on the caſe for diverting the plaintiff's watercourſe, where the jury under circumſtances of aggravation gave 3000 *l.* damages, the Court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved: but they directed that the former verdict ſhould ſtand as a ſecurity in the mean time for the damages which might be given on the ſecond trial. *Pleydell* v. *Ld. Dorcheſter, H.* 38 *G.* 3. 529

NIL HABUIT IN TENEMENTIS,

See COVENANT, No. 2.

NISI PRIUS,

See WRIT, No. 1, 2.

NON PROS,

See PRACTICE, No. 3.

NONSUIT,

See JUDGMENT *as in Caſe of.*

NOTICE,

See JUSTICE OF PEACE, No. 1, 2.

NOTICE TO QUIT,

See LANDLORD AND TENANT, No. 2.

1. A notice delivered to a tenant at *Michaelmas* 1795 to quit at "*Lady-day* which will be in the year 1795" was holden to be a good notice to quit at *Lady-day* 1796.

Doe d. *Duke of Bedford* v. *Kightley*, *M.* 37 *G.* 3. *Page* 63

2. Where tenant for life grants a leaſe for years which is void againſt the remainder-man, and the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old term, and therefore half a year's notice to quit from the remainder-man ending with the old year is good. *Doe* d. *Collins* v. *Weller*, *H.* 38 *G.* 3. 478

NUISANCE,

See Bond, No. 3. Indictment, No. 2.

O.

OCCUPIER,

See Poor Rate, No. 2, 3.

OFFICER.

1. A churchwarden making a diſtreſs for a poor-rate under a warrant of magiſtrates, is entitled to the protection of the ſtat. 24 *Geo.* 3. *c.* 44. in having the magiſtrates joined with him as defendants in an action of treſpaſs. *Harper* v. *Carr*, *E.* 37 *G.* 3. 270

OUTLAWRY,

See Landlord and Tenant, No. 4, 5.

P.

PALATINE COUNTY,

See Trial, No. 2.

PARISH APPRENTICE,

See Apprentice, No. 1, 2.

PARTNER,

See Abatement, No. 3. Assumpsit, No. 3. Insurance, No. 8.

1. One partner cannot bind the other partners by deed. *Harriſon* v. *Ruſhforth*, *E.* 37 *G.* 3. 207

2. But he may by drawing or accepting bills of exchange. *Ib.* 210

PARTY GRIEVED,

See Costs, No. 1, 2.

PAYMENT,

See Bankrupt, No. 19.

1. If the ſeller of goods take notes or bills for them, without agreeing to run the riſk of the notes being paid, and the notes turn out to be worth nothing, this will not be conſidered as payment. *Owenſon* v. *Morſe*, *M.* 37 *G.* 3. *Page* 64

PAYMENT OF MONEY INTO COURT,

See Costs, No. 6.

1. The Court will not permit a defendant to pay money into court in an action againſt the ſheriff for a falſe return to a *fi. fa.* *Bowles* v. *Fuller*, *T.* 37 *G.* 3. 335

PEDIGREE,

See Evidence, No. 2.

PEER,

See Attachment, No. 1.

PENALTY,

See Information, No. 3.

1. When a ſtatute creates a penalty, and ſays that one moiety ſhall be to the uſe of the king and the other to a common informer, the king may ſue for the whole unleſs a common informer has commenced a *qui tam* ſuit for the penalty. *R.* v. *Hymen*, *E.* 38 *G.* 3. 536

2. In ſuch a caſe the king may recover the penalty by an information filed by the Attorney General in *B. R.* *ib.*

PERJURY.

1. An indictment for perjury aſſigned on an affidavit ſworn before the Court of *B. R.* need not ſtate, nor is it neceſſary to prove, that the affidavit was filed of record or exhibited to the Court, or in any manner uſed by the party. *R.* v. *Croſsley*, *T.* 37 *G.* 3. 315

2. Perjury may be aſſigned on an affidavit of an attorney of the court made in anſwer to a charge exhibited againſt him in a ſummary way for having in his poſſeſſion blank pieces of paper with affidavit ſtamps, and the ſignatures of a Maſter extraordinary in Chancery and another perſon at the bottom of the papers. *ib.*

3. It is no objection to ſuch an indictment that it is not ſtated where the court was holden

holden when the original application was made, or when the rule was made calling on the defendant to anſwer the charge, a ſufficient venue being laid to the fact of taking the falſe oath. *Ib.* *Page* 315

PHYSICIANS.

1. A doctor of phyſic, who has been licenſed by the College of Phyſicians to practiſe phyſic in *London* and within ſeven miles, cannot claim as a matter of right to be examined by the College in order to his being admitted a fellow of the College. *R.* v. *The Preſident and College of Phyſicians, E.* 37 *G.* 3. - 282
2. The College of Phyſicians, who have power by their charter (confirmed by act of parliament) to make bye-laws, have made bye-laws reſpecting the qualifications of perſons to be admitted into the College: by them it is ordained that no perſon ſhall be admitted into the claſs of candidates before admiſſion into the College, unleſs he has taken a degree of M. D. at *Oxford, Cambridge* or *Dublin*, except in two caſes; in one of thoſe caſes the preſident may propoſe once in every other year a doctor of phyſic of a certain ſtanding, and if he be approved by the College, he may be admitted a fellow; in the other any fellow may propoſe a doctor of phyſic of a certain age and ſtanding, and if approved at certain meetings he may be admitted a fellow: held that theſe were reaſonable bye-laws. *Ib.* 282

PILOT,

See INSURANCE, No. 3, 4.

PLEADING,

See BANKRUPT, No. 8, 9. INDICTMENT, No. 1. PERJURY, No. 1, 2, 3. SLANDER, No. 1, 2.

1. Where an exception is in the enacting clauſe of a ſtatute giving a right or a forfeiture, the party ſuing for the right or forfeiture muſt negative the exception in his declaration. *Gill* v. *Scrivens, M.* 37 *G.* 3. 27
2. Therefore in a *ſci. fa.* on a judgment againſt a perſon, who has been twice a bankrupt, under the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 9. which ſays "the future eſtate and effects of ſuch perſon ſhall be liable to his creditors *unleſs* the eſtate ſhall produce ſufficient to pay 15 *s.* in the pound &c." it is neceſſary for the plaintiff to aver that the bankrupt's eſtate has not paid 15 *s.* in the pound. *Ib.* *Page* 27
3. In an action on the caſe for not delivering corn at *S.* purſuant to an agreement, whereby the defendant in conſideration that the plaintiff had bought of him a certain quantity at a fixed price undertook to deliver it to the plaintiff at *S.* within one month from the time of the ſale, the plaintiff muſt aver a tender of the price or what is equivalent thereto. *Morton* v. *Lamb, H.* 37 *G.* 3. 125
4. In ſuch a caſe the delivery of the corn and the payment of the price were concurrent acts to be done at the ſame time; and each muſt aver performance or an offer to perform his part before he can maintain an action againſt the other. *ib.*
5. In an action againſt a wharfinger to whom goods were ſent to be ſhipped, for neglecting to take out a ſufferance, for want of which the goods were ſeized, it is not neceſſary to aver or prove that the goods were condemned by a ſentence *in rem.* *Baker* v. *Liſcoe, H.* 37 *G.* 3. 171
6. In ſuch a caſe it is ſufficient to aver that "for want of ſuch ſufferance the ſaid goods were *ſeized as forfeited*, whereby the ſame became wholly loſt to the plaintiff;" and proof of a ſeizure in fact by the officer for a juſt cauſe of forfeiture will ſuſtain the declaration. *ib.*
7. In aſſumpſit brought by an adminiſtrator *de bonis non*, the promiſe may be laid to have been made to the firſt adminiſtrator. *Hirſt* v. *Smith, E.* 37 *G.* 3. 182
8. Where defendant had been ſued as the Right Honorable *Hamilton Flemyng* Earl of *Wigtown*, having privilege of peerage, and had judgment againſt him, and in debt on that judgment he was called *Hamilton Flemyng* Eſq. commonly called Earl of *Wigtown*; on *nul tiel record* pleaded, held to be a failure of record. *Blackmore* v. *Flemyng, M.* 38 *G.* 3. 447, *n.*
9. By the ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 11 & 12. and 5 *G.* 2. *c.* 30. *ſ.* 29. after any perſon has been convicted on an indictment for falſely ſwearing to a debt under a commiſſion of bankrupt (on which indictment he is to ſuffer the puniſhment inflicted by the ſeveral

ſeveral ſtatutes againſt perjury) the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to in an action, in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging that the defendant did take ſuch falſe oath. *Holmes and others, Aſſignees of Brook a Bankrupt*, v. *Walſh*, *H.* 38 *G.* 3. *Page* 458

10. In ſuch action the defendant cannot take advantage of any defect in the judgment on the indictment: for that can only be done on a writ of error. *ib.*

11. In an action on the 34 *G.* 3. *c.* 23. for pirating a pattern for printing callico, the omiſſion of an averment in the declaration, "that the day of firſt publiſhing the pattern was printed at each end of the piece of callico" (which together with the name of the proprietor is required by that ſtatute, the monopoly being limited for three months from the day of firſt publiſhing the pattern) was holden to be aided by verdict; it being ſtated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the firſt publiſhing thereof, and while the plaintiffs were entitled to have the ſole right of printing the ſame* &c. *Mackmurdo* v. *Smith*, *H.* 38 *G.* 3. 518

12. It is not neceſſary in a declaration on a bill of exchange to aver that the maker *delivered* it: it is ſufficient to ſtate that he made it. *Churchill* v. *Gardner*, *E.* 38 *G.* 3. 596

13. The Court will grant leave to enter the continuances after verdict in order to arrive at the juſtice of the caſe. *Doe* d. *Mears* v. *Dolman*, *E.* 38 *G.* 3. 618

POLICY,

See INSURANCE.

POOR-RATE.

1. An attorney is not liable to be aſſeſſed to the poor-rates in reſpect of the profits of his profeſſion. *R.* v. *J. Startifant*, *M.* 37 *G.* 3. 60

2. The granting of a warrant of diſtreſs by magiſtrates to enforce payment of a poor rate is a judicial, not a miniſterial act; they ought firſt to ſummon the party and hear what he has to ſay in his defence. *Harper* v. *Carr*, *E.* 37 *G.* 3. 270

3. A leſſee of lands ſhould be rated to the poor according to the preſent value of the lands. *R.* v. *Skingle*, *E.* 38 *G.* 3. *Page* 549

4. *A.* having granted to *B.* a leaſe for years of way leaves, (for the purpoſe of carrying coals,) and the liberty of erecting bridges, and levelling hills over certain lands, *B.* made the waggon-ways, incloſed them, thereby excluding all other perſons, erected bridges, and built two houſes on the land for his ſervants; held that *B.* was liable to be rated to the poor for "the ground called the waggon-way." *R.* v. *Bell*, *E.* 38 *G.* 3. 598

5. The occupier of land is liable to be rated to the poor, without conſidering whether he has any title. *ib.*

POSSESSIO FRATRIS,

See SEISIN, No. 1, 2, 3.

POWER.

1. By a marriage ſettlement an eſtate was ſettled to the uſe of the wife for life, remainder to ſuch perſons and for ſuch eſtates as ſhe ſhould by deed or will atteſted by three witneſſes appoint, and for want of ſuch appointment reverſion to herſelf in fee: during her huſband's life ſhe made a will in purſuance of the power deviſing the eſtate to *A.* in fee; after which ſhe and her huſband executed a leaſe of part of the ſettled eſtate to the defendant, not executed purſuant to the power; and after the huſband's death ſhe received rent from the defendant. Held that ſuch leaſe was avoidable only by her upon her huſband's death, and that her receipt of rent accruing afterwards was a confirmation of it againſt *A.*, who claimed under the appointment by the will. *Doe* d. *Collins* v. *Weller*, *H.* 38 *G.* 3. 478

2. Under a power of leaſing for one, two, or three lives or for any term of years determinable on one, two, or three lives ſuch lands as were then demiſed for any ſuch term, lands are not included which were then held under a demiſe to "*W.* and *G.* for ninety-nine years if *W.* and his widow and any eldeſt ſon living or *in ventre ſa mere*, at the time of his (*W.*'s) death, or if no ſon, any eldeſt daughter then living or *in ventre ſa mere*, or any other of thoſe three, *viz.* of the ſaid *W.* and ſuch his wife, ſon or daughter ſhould ſo long live, remainder to the ſaid *G.* and his widow ſon or daughter in the ſame manner," of which

deſcription of perſons five were in fact living at the time of the power reſerved, who were all entitled in ſucceſſion, three at a time, to come in under the leaſe: for under ſuch a general power the three lives muſt be certain and co-exiſting. *Doe* d. *Wyndham* v. *Halcombe*, *T.* 38 *G.* 3. *P.* 713

PRACTICE,

See AMENDMENT. ATTORNEY, No. 1, 2, 3. BAIL, No. 1, 2. DEATH OF DEFENDANT, No. 1. DISCONTINUANCE, No. 1. INFORMATION. INSOLVENT DEBTOR. PAYMENT OF MONEY INTO COURT. SHERIFF, No. 1. VENUE. WARRANT OF ATTORNEY, No. 1.

1. It is irregular to file a declaration in the office when the defendant's place of reſidence is known to the plaintiff. *Oldham* v. *Burrell*, *M.* 37 *G.* 3. 26
2. It is no exception againſt bail, until the plaintiff give notice of the exception. *ib.*
3. The ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 2., enabling a defendant to ſign judgment of non pros for want of a declaration in due time, extends to all caſes. *ib.*
4. Under certain circumſtances the Court will ſtay the proceedings in an action of treſpaſs for ſeizing goods, on the defendant's reſtoring the goods, or paying the full value of them, with the coſts of the action. *Pickering* v. *Truſte*, *M.* 37 *G.* 3. 53
5. It is irregular to hold a defendant to bail in aſſumpſit, and then to declare in trover. *Tetherington* v. *Golding*, *M.* 37 *G.* 3. 80
6. A plaintiff cannot declare by the bye before he has declared in chief. *ib.*
7. Though judgment has been irregularly ſigned without filing common bail for the defendant according to the ſtatute until after the ſucceeding term after the writ was returnable and after the judgment itſelf has been entered up, yet the defendant having given a cognovit is eſtopped from objecting to the irregularity, if before the time of making the objection the plaintiff has filed common bail *nunc pro tunc*. *Davis* v. *Hughes*, *E.* 37 *G.* 3. 206
8. Upon an application to ſet aſide an attachment againſt the ſheriff for not bringing in the body, bail having been put in and no trial loſt, the Court require an affidavit of merits if the application come from the defendant, but not if it come *bonâ fide* from the ſheriff. *R.* v. *The Sheriff of Surry*, *E.* 37 *G.* 3. *Page* 239
9. But where ſuch attachment has regularly iſſued, the Court will on no account relieve the ſheriff, if it appear that he let the defendant out of cuſtody without taking from him ſuch a bail-bond as is required by the ſtatute. *ib.*
10. A declaration is only well filed from the time of notice, whether it be a declaration in chief or *de bene eſſe*; and therefore the defendant has four days after notice in which to plead in abatement. *Hutchinſon* v. *Brown*, *E.* 37 *G.* 3. 298
11. The defendant in the original action need not obtain a judge's order to change his attorney on bringing a writ of error. *Batchelor* v. *Ellis*, *T.* 37 *G.* 3. 337
12. The *Engliſh* notice to appear muſt be added to all common proceſs where the defendant is not holden to bail, whether the cauſe of action do or do not amount to 10 *l.* *Lumley q. t.* v. *Fitz*, *T.* 37 *G.* 3. *ib.*
13. After an attachment againſt the ſheriff for not bringing in the body the Court will only relieve him upon paying the whole debt and coſts, and not merely the ſum ſworn to and coſts. *Keppel* v. *King*, *T.* 37 *G.* 3. 370
14. If a defendant on being informed that a bailable writ has been iſſued againſt him voluntarily give a bail-bond, he cannot afterwards object to the inſufficiency of the affidavit to hold to bail. *Norton* v. *Danvers*, *M.* 38 *G.* 3. 375
15. Affidavits to ſet aſide an attachment that has been *granted* (though not *iſſued*) in the courſe of a civil ſuit muſt be intitled "*R.* v. *The Party to be attached*" &c. *R.* v. *The Sheriff of Middleſex*, *M.* 38 *G.* 3. 439
16. After judgment by default in an action of debt on a judgment the plaintiff may ſue out a writ of inquiry. *Blackmore* v. *Flemyng*, *M.* 38 *G.* 3. 446
17. And the jury may give intereſt by way of damages. *ib.*
18. In *C. B.* it was referred to the prothonotary, in debt on bond after judgment by default, to tax intereſt by way of damages, it being at the plaintiff's option to have intereſt ſo taxed or to have a writ of inquiry. *Holdipp* v. *Otway*, cited. 447
19. There cannot be a plea in abatement intitled as of the term ſubſequent to that in

which the declaration is delivered without a ſpecial imparlance. *Blackmore* v. *Flemyng*, *M.* 38 *G.* 3. *Page* 447

20. The Court will not grant an attachment againſt a member of parliament for non-payment of money according to an award. *Catmur* v. *Sir E. Knatchbull and others*, *M.* 38 *G.* 3. 448

21. The ſheriff having returned *cepi corpus* to a bailable writ in *Hilary* term 1797, upon which the plaintiff proceeded no further till *Michaelmas* term following, the Court thought it unreaſonable that the ſheriff ſhould be called upon to bring in the body after ſuch delay, and they ſet aſide an attachment which had iſſued againſt him for not doing it. *R.* v. *The Sheriff of Surry*, *M.* 38 *G.* 3. 452

22. Affidavits of any cauſe of action before proceſs ſued out to hold defendants to bail are not to be intitled in any cauſe. *Reg. Gen.* *T.* 37 *G.* 3. 454

23. All ſpecial caſes ſet down for argument by the clerk of the papers ſhall be entered within the four firſt days of the term next after the trial at which ſuch ſpecial caſes have been reſerved, and none ſhall ever be ſet down for argument on any of the four laſt days of the term. *Reg. Gen.* *M.* 38 *G.* 3. *ib.*

24. Demurrer to one count on a bill of exchange and judgment for the plaintiff; plea to the other counts, on which iſſue was joined; referred to the Maſter to ſee what was due to the plaintiff on the former. *Duperoy* v. *Johnſon*, *H.* 38 *G.* 3. 473

25. If a defendant be ſent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the court will order the bail-bond to be delivered up to be cancelled. *Poſtel* v. *Williams*, *H.* 38 *G.* 3. 517

26. An attachment againſt the ſheriff granted on the 24th *January* was ſet aſide for irregularity, he having been ruled to bring in the body on the 23d *November* preceding, which expired on the 28th, and having put in bail above on the 24th, though the time for putting it in expired on the 22d; and the defendant being ſurrendered in diſcharge of his bail on the 28th, without the bail having juſtified. *R.* v. *The Sheriff of Middleſex*, *H.* 38 *G.* 3. 527

27. The rule of court of *Trin.* 33 *G.* 3. extends to the caſe of the ſheriff. *ib.*

28. The defendant cannot put in a ſpecial demurrer when he is under terms of pleading iſſuably. *Berry* v. *Anderſon*, *H.* 38 *G.* 3. *Page* 530

29. The Court will grant leave to enter the continuances after verdict in order to arrive at the juſtice of the caſe. *Doe* d. *Mears* v. *Dolman*, *E.* 38 *G.* 3. 618

30. The chriſtian names as well as ſurnames of the parties muſt be inſerted in the title of an affidavit produced to ſhew cauſe againſt any rule. *Fores* v. *Diemar*, *E.* 38 *G.* 3. 661

31. The defendant cannot change the venue after an order for time to plead, on the terms of pleading iſſuably and taking ſhort notice of trial for the firſt ſittings in *London* or *Middleſex*. *Shipley* v. *Cooper*, *T.* 38 *G.* 3. 698

32. The Court will give the plaintiff leave to amend his declaration after the ſecond term even againſt a priſoner; but they will not permit him to add new counts to his declaration in ſuch a caſe. *Owens* v. *Dubois*, *T.* 38 *G.* 3. *ib.*

PRESUMPTION.

1. The jury may preſume an old ſatisfied term ſurrendered to the *ceſtui que uſe*, in order to ſubſtantiate a leaſe executed by him, or a conveyance by truſtees where they ought to have conveyed. *Doe* d. *Bowerman* v. *Sybourn*, *M.* 37 *G.* 3. 2

2. But if no ſuch preſumption be made, and it appear in a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee who is not joined in bringing the ejectment, the *ceſtui que uſe* cannot recover. *Goodtitle* d. *Jones* v. *Jones*, *M.* 37 *G.* 3. 47

PRISONER,

See ATTORNEY, No. 6. RULES OF COURT, No. 2.

PRIVILEGE,

See ATTORNEY, No. 1, 2.

PROCESS,

See TRESPASS, No. 1.

PROMISSORY NOTES,

See BILLS OF EXCHANGE.

PROTEST,
See EVIDENCE, No. 7.

PROVISO,
See TRIAL, No. 1.

Q.

QUARTER SESSIONS,
See COUNTY RATE, No. 1. or COSTS, No. 7,

R.

RATE,
See COUNTY-RATE. POOR-RATE.

REPUBLICATION,
See DEVISE, No. 7.

RELATION,
See JUDGMEMT, No. 1.

RENT,
See LANDLORD AND TENANT, No. 4, 5.

REVOCATION,
See DEVISE, No. 6.

RIOT,
See HUNDRED.

RULES OF COURT.

1. If a rule to ſet aſide proceedings for irregularity with coſts be diſcharged, it muſt be underſtood that the rule is diſcharged with coſts. *M.* 37 *G.* 3. *Page* 82
2. A priſoner in the *B. R.* priſon may, on ſhewing ſpecial cauſe, obtain additional day rules beyond thoſe allowed by the rule of court in *E.* 30 *G.* 3. *M.* 37 *G.* 3. *ib.*
3. Where ſeveral perſons join in an affidavit, their names muſt be written in the jurat; and no affidavit can be read if there be any interlineation or eraſure in the jurat. *M.* 37 *G.* 3. *ib.*
4. Inſolvent debtors petitioning under the Lords' act 32 *G.* 2. and ſubſequent acts ſhall be brought into court during term time on *Mondays* and *Thurſdays* only. *H.* 37 *G.* 3. 454
5. Affidavits of any cauſe of action before proceſs ſued out to hold defendants to bail are not to be entitled in any cauſe. *T.* 37 *G.* 3. *ib.*
6. All ſpecial caſes ſet down for argument by the clerk of the papers ſhall be entered within the four firſt days of the term next after the trial at which ſuch ſpecial caſes have been reſerved; and none ſhall ever be ſet down for argument on any of the four laſt days of the term. *M.* 38 *G.* 3. *Page* 454

S.

SAILOR,
See IMPRESS. INSURANCE, No. 1, 2.

SCIRE FACIAS,
See PLEADING, No. 2.

SEISIN.

1. *A.* died ſeiſed leaving two infant daughters by different venters: held that an entry generally by the mother of the youngeſt daughter as her guardian in ſocage conſtituted a ſufficient ſeiſin in the eldeſt infant daughter to carry the deſcent of her moiety on her death to her heirs. *Doe* d. *Barnett and others* v. *Keen*, *M.* 38 *G.* 3. 386
2. An infant may conſider whoever enters on his eſtate as entering for his uſe. *ib.*
3. The diſtinction taken is that if a father die, his eſtate being out on a *freehold* leaſe, that is not ſuch a poſſeſſion as to induce the *poſſeſſio fratris*, unleſs the elder ſon live to receive rent after the expiration of ſuch leaſe; but if the father's eſtate were out at his death on a leaſe for *years* only, the poſſeſſion of the tenant is a ſufficient poſſeſſion of the elder ſon to conſtitute the *poſſeſſio fratris.* *ib.*

SESSIONS,
See APPEAL, No. 1, 2, 3, 4.

SET-OFF.

1. If a factor, who ſells under a *del credere* commiſſion, ſell goods as his own, and the buyer know nothing of the principal, the buyer may ſet off any demand he may have on the factor againſt the demand for the goods made by the principal. *George* v. *Clagett*, *T.* 37 *G.* 3. 359
2. *A.* firſt purchaſed one and afterwards another parcel of goods of *B.*, each at ſix months credit: when the firſt ſum became due *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value

of the goods in order to pay for them, *B.* engaging to return to *A.* the overplus when the bill ſhould be paid: *B.* received the amount of the bill, and then *A.* became a bankrupt, not having paid for the ſecond parcel of goods: held in an action brought by *A.*'s aſſignees for the ſurplus of the bill that *B.* might retain it to ſatisfy his demand on *A.* for the ſecond parcel of goods. *Atkinſon and others, Aſſignees of Hodges a Bankrupt,* v. *Elliott and another, M.* 38 *G.* 3. *Page* 378

SETTLEMENT,

—— By renting 10*l.* *per Annum.*

1. A reſidence for forty days is indiſpenſably neceſſary to enable a party to gain a ſettlement by reſiding on a tenement of 10*l.* *per annum.* *R.* v. *The Inhabitants of Llanbedergoch, H.* 37 *G.* 3. 105
2. So that, if a party after reſiding on ſuch a tenement for twenty-nine days be forcibly prevented reſiding there eleven days more, he does not thereby gain a ſettlement. *ib.*
3. In ſettlement caſes the Court will not infer fraud from circumſtances: fraud muſt be ſtated expreſsly. *ib.*
4. It is not neceſſary that the pauper ſhould pay 10*l.* a-year in money for a tenement, in order to gain a ſettlement: it is ſufficient if he occupy a tenement of the annual value of 10*l.* as tenant. *R.* v. *The Inhabitants of Fritwell, E.* 37 *G.* 3. 197
5. *A.* took a tenement of 10*l.* a-year in the pariſh of *B.*, and after living in it with his family five days he was arreſted and ſent to priſon in the pariſh of *C.*, but his wife and children continued in it ſeven weeks longer: held that no ſettlement was gained in *B.* either by the huſband or wife. *R.* v. *The Inhabitants of St. George the Martyr, Southwark, H.* 38 *G.* 3. 466
6. A ſettlement may be gained by renting a right of common in groſs of the annual value of 10*l.* that being a tenement within the 13 & 14 *Car.* 2. *R.* v. *The Inhabitants of Derſingham, T.* 38 *G.* 3. 671

—— By Certificate.

1. A certificate granted under ſtat. 8 & 9 *W.* 3. *c.* 30. to the head of a family in general extends to all his children living with him. *R.* v. *The Inhabitants of Storrington, H.* 37 *G.* 3. 136
2. But if the parties wiſh it, it may be ſo framed as to exclude a ſon of the age of fourteen, who maintains himſelf by his own labour. *Ib.* *Page* 136
3. A certificate does not extend to illegitimate children. *R.* v. *The Inhabitants of Mathon, T.* 37 *G.* 3. 362
4. And therefore where the pariſh officers of *A.* engaged by a certificate to receive the certificated perſon, therein ſtated to be an unmarried woman, and the child of which ſhe was ſtated to be then pregnant, and all other children ſhe might afterwards have, it was ruled that the certificate did not extend to an illegitimate child born ſeveral years afterwards. *ib.*
5. The ſon of a certificated perſon cannot gain a ſettlement in the certificated pariſh by apprenticeſhip, though the father (to whom the certificate was given) died ſix months before the expiration of the apprenticeſhip. *R.* v. *The Inhabitants of Alfreton, H.* 38 *G.* 3. 471

—— By hiring and Service.

1. A ſervant who had been hired for a year was beaten by her maſter ſixteen days before the end of the year, on which ſhe deſired him to diſmiſs her from his ſervice, threatening to apply to a magiſtrate for redreſs: the maſter paid her her whole year's wages and told her ſhe might ſerve the remainder of the year; but the ſervant went away: held that the ſervant gained no ſettlement. *R.* v. *The Inhabitants of Upwell, M.* 38 *G.* 3. 438
2. Under a hiring from *Whitſuntide* to *Whitſuntide* a ſervice of 365 days, though leſs than the period of the contract in the particular year, is ſufficient to confer a ſettlement. *R.* v. *The Inhabitants of Ulverſtone, E.* 38 *G.* 3. 564

SHERIFF,

See Bail, No. 2, 3, 4. Evidence, No. 4. Practice, No. 8, 9. 13.

1. The Court upon the application of the ſheriff enlarged the time for his making a return to the writ of *fi. fa.* upon a ſuggeſtion of a reaſonable doubt whether the goods ſeized under the writ were not covered by an extent afterwards iſſued at the ſuit of the crown for malt duties under the ſtat. 28 *G.* 3. *c.* 37. *ſ.* 21. for the pur-

poſe

poſe of inducing the plaintiff to go into the Court of Exchequer and there conteſt the queſtion of right with the crown, *Wells* v. *Pickman*, *H.* 37 *G.* 3. *Page* 174

SHIP.

1. *A.* and *B.* being joint owners of a ſhip, *A.* conveyed his moiety to *B.*, but in the bill of ſale the certificate of regiſtry was not truly recited; *B.* took poſſeſſion, and afterwards mortgaged the whole ſhip to *A.* who did not take poſſeſſion; then *B.* ordered *C.* to repair the ſhip; afterwards *B.* conveyed one half of the ſhip to *A.* and the other to *D.*: it was held that the firſt bill of ſale was an abſolute nullity by reaſon of the ſtat. 26 *Geo.* 3. *c.* 60. *ſ.* 17., and that *A.* was liable to *C.* for the repairs of the ſhip in an action for work and labour brought by *C.*, *A.* not having pleaded in abatement that *B.* ought alſo to have been ſued. *Weſterdell* v. *Dale*, *T.* 37 *G.* 3. 306

2. Whether a mortgagee of a ſhip, out of poſſeſſion, be not liable for the repairs? *Qu.* *ib.*

SLANDER.

1. It is no juſtification to an action of ſlander to plead that *A. B.* told the ſlander to the defendant. *Davis* v. *Lewis*, *M.* 37 *G.* 3. 17

2. But if the perſon repeating the ſlander at the ſame time mention the name of the perſon from whom he heard it, that may be pleaded in juſtification to an action brought againſt the former. *ib.*

SLAVE TRADE,

See INSURANCE, No. 6.

STAMP,

See ASSUMPSIT, No. 2. AWARD, No. 5. BILLS OF EXCHANGE, No. 1.

1. A note for the weekly payment of 3*s.* 6*d.* under the Lords' act muſt be ſtamped. *Pitman* v. *Haynes*, *H.* 38 *G.* 3. 530
Sed contra. *Tekell* v. *Caſey*, *T.* 38 *G.* 3. 670

STATUTES.

1. Whether the ſtat. 1 *Jac.* 1. *c.* 27. be repealed by the ſtat. 22 & 23 *Car.* 2. *c.* 25.? *Qu.* *R.* v. *J. A. Harris*, *E.* 37 *G.* 3. 238

STATUTES,

See *Jeofails.*

EDWARD I.

6. *c.* 1. Coſts. *Page* 268

EDWARD III.

28. *c.* 6. Coroners. 52

HENRY VI.

23. *c.* 9. Bail-bonds. 109

RICHARD III.

1. *c.* 1. *Ceſtui que uſe.* 49

ELIZABETH.

29. *c.* 4. Sheriff. 267
31. *c.* 5. Penal Actions. 55. 179
43. *c.* 2. *ſ.* 1. Pariſh Apprentice. 34

JAMES I.

1. *c.* 15. Bankrupt. 458. 509. 711
1. *c.* 27. Game. 238
3. *c.* 8. Bail in Error. 449
7. *c.* 5. Coſts. 448
21. *c.* 19. Bankrupt. 230

CHARLES II.

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22. *c.* 9. Coſts. 659
22. & 23. *c.* 25. Game. 238
29. *c* 3. *ſ.* 17. Statute of Frauds. 14
——— *ſ.* 13, 15. Statute of Frauds. 21. 23

WILLIAM AND MARY.

5. *c.* 11. *ſ.* 3. Coſts. 32
6 & 7. *c.* 18. Impreſs. 673
8 & 9. *c* 11. Coſts. 367
8 & 9. *c.* 30. Certificate. 134
9 & 10. *c.* 11. Certificate. 134
9 & 10. *c* 15. Award. 1. 74

ANNE.

4. *c.* 16. *ſ.* 13. Bond. 124
4. *c.* 16. *ſ.* 20. Bail-bond. 123
8. *c.* 9. Apprentice. 121
9. *c.* 14. Gaming. 257
12. *ſt.* 2. *c.* 16. Uſury. 184

GEORGE I.

1. *ſt.* 2. *c.* 5. Riot. *Page* 496
6. *c.* 18. Inſurance. 339
12. *c.* 29. *ſ.* 1. Writ. 337

GEORGE II.

2. *c.* 23. Attorney. 456
4. *c.* 28. *ſ.* 2. Landlord. 118
5. *c.* 20. Pilot. 160
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7. *c.* 8. Stock-jobbing. 178. 630
7. *c.* 20. *ſ.* 3. Mortgagor. 186
11. *c.* 19. Diſtreſs. Coſts. 500
12. *c.* 13. Priſoner. 671
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22. *c.* 46. Attorney. 458
24. *c.* 44. *ſ.* 6. Officer. Notice. 270. 631
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GEORGE III.

13. *c.* 78. *ſ.* 1. Surveyors. Highways. 170
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17. *c.* 26. Annuity. 195. 205. 248
25. *c.* 80. Certificate. Attorney. 25
26. *c.* 60. Ships. 308
26. *c.* 73. Exciſe-duties. 56
28. *c.* 37. *ſ.* 21. Malt-duties. 174
31. *c.* 54. Slave-trade ſhips. 186
34. *c.* 23. Callico pattern. 518
34. *c.* 53. *Huddersfield* Canal. 37
34. *c.* 69. Inſolvent debtor. 305
37. *c.* 33. Billeting. 724

STAYING PROCEEDINGS,
See PRACTICE, No. 4.

STOCK-JOBBING.

1. If a broker draw on his employer for differences paid for him in ſtock-jobbing tranſactions, and the employer accept the bill, and then the broker indorſe it to a third perſon after it is due, the latter cannot recover on the bill. *Brown* v. *Turner*, *E.* 38 *G.* 3. 630
2. Jobbing in *omnium* is within the ſtatute 7 *G.* 2. *c.* 8. *ib.*

STOPPING IN TRANSITU,
See PAYMENT, No. 1.

1. *A.* agreed to buy ſome articles of plate of *B.*, who was to get *A.*'s arms engraved on them and to pay for the engraving; held that a delivery to the engraver for that purpoſe was not a delivery to *A.* ſo as to defeat *B.*'s right of ſtopping the goods *in tranſitu*, the price of the goods not being paid by *A.* *Owenſon* v. *Morſe*, *M.* 37 *G.* 3. *Page* 64
2. A conſignor's right of ſtopping goods *in tranſitu* is not taken away by the conſignee's having partly paid for the goods. *Hodgſon and another*, *Aſſignees of Ward a Bankrupt*, v. *Loy*, *M.* 38 *G.* 3. 440

SURETY,
See BANKRUPT, No. 5.

SURVEYORS,
See HIGHWAYS, No. 1.

T.

TENANT,
See LANDLORD AND TENANT.

TENANT IN TAIL.

1. A conveyance by tenant in tail by leaſe and releaſe neither bars the iſſue in tail or works a diſcontinuance: but it paſſes a baſe fee voidable by the iſſue in tail by entry. *Doe* d. *Neville* v. *Rivers*, *E.* 37 *G.* 3. 276
2. Tenant in tail by leaſe and releaſe previous to her marriage conveyed to truſtees to the uſe of herſelf till the marriage, then to the huſband for life, then to herſelf for life, then to the firſt and other ſons of the marriage &c.; tenant in tail died before the huſband, leaving a ſon: held that the huſband was not entitled to a life-eſtate either under the ſettlement or by the curteſy. *ib.*

TITHES,
See GRANT, No. 1.

1. Hops are tithable after they are gathered from the bind: and it ſeems that a cuſtom to ſet out the tithes by the tenth hill, where the rows are unequal, leaving the binds uncut and the poles ſtanding, cannot be ſupported. *Knight* v. *Halſey*, *H.* 37 *G.* 3. 86
2. A cuſtom to pay only a part of the tithe, without ſubſtituting any thing elſe in lieu of the remainder, is bad. *Ib.* 93

3. But a cuſtom to pay leſs than the whole tithe may be good, where ſomething in lieu of and as a compenſation for the reſt is paid to the parſon. *Ib.* *Page* 93

TRANSITU, *Stopping in.*
See STOPPING IN TRANSITU.

TRESPASS,
See EVIDENCE, No. 10.

1. In treſpaſs for breaking and entering the plaintiff's cloſe and taking his goods the defendant may juſtify under a ſufficient legal proceſs if he had it in fact at the time, though he declared then that he entered for another cauſe. *Crowther* v. *Ramſbottom*, *E.* 38 *G.* 3. 654
2. If a declaration in treſpaſs contain two counts, and the defendant plead to one, and ſuffer judgment by default on another, and on the trial of the firſt the plaintiff only prove one act of treſpaſs which is covered by the ſecond count, he is not entitled to a verdict on the firſt count. *Lee Compere* v. *Hicks*, *T.* 38 *G.* 3. 727

TRIAL.

1. A defendant in a caſe where the king is party cannot carry down the *niſi prius* record to trial by proviſo. *R.* v. *Dyde*, *E.* 38 *G.* 3. 661
2. Upon a ſuggeſtion entered by leave of the Court upon the roll that a fair and impartial trial cannot be had in the county of the city of *Cheſter*, the Court will award the trial to be had in the adjoining county-palatine. *R.* v. *The Inhabitants of St. Mary on the Hill, Cheſter*, *T.* 38 *G.* 3. 735

TROVER.

1. In order to maintain trover the plaintiff muſt have the right of poſſeſſion as well as of property. *Gordon* v. *Harper*, *M.* 37 *G.* 3. 9
2. And therefore where furniture, which had been leaſed with the houſe, was wrongfully taken in execution by the ſheriff, it was ruled that the landlord could not maintain trover pending the leaſe. *ib.*
3. An uncertificated bankrupt may maintain trover for goods acquired by him ſince his bankruptcy, as againſt all the world but his aſſignees. *Webb* v. *Fox*, *M.* 38 *G.* 3. 391

TRUST AND TRUSTEES,
See DEVISE, No. 5. 13. EVIDENCE, No. 12. LIMITATION, No. 1. PRESUMPTION, No. 1.

TURNPIKE ROAD,
See HIGHWAYS, No. 2.

V.

VENIRE DE NOVO.

1. The Court will only award a *venire de novo* where there is a defective finding in the verdict. *Goodtitle* d. *Jones* v. *Jones*, *M.* 37 *G.* 3. *Page* 52

VENUE.

1. In a plea in abatement that another perſon ought to have been ſued with the defendant, it is not neceſſary to lay a venue. *Neale* v. *De Garay*, *E.* 37 *G.* 3. 243
2. And if it be pleaded that ſuch other perſon is alive, to wit, in *Spain*, it will be conſidered as pleaded without any venue. *ib.*
3. If the venue be changed from *A.* to *B.* on the uſual affidavit that the cauſe of action aroſe wholly in *B.* when in fact part of the cauſe aroſe in another county, the Court will order the venue to be brought back to *A.* *Caillard* v. *Champion*, *E.* 37 *G.* 3. 205
4. Where there are ſeveral facts material to the plaintiff's action ariſing in different counties, he may bring his action (covenant) in either. *The Mayor &c of London* v. *Cole*, *E.* 38 *G.* 3. 583
5. If a local action be brought and tried in a wrong county, the defect is aided after verdict by 16 & 17 *Car.* 2. *c.* 8. *ib.*
6. The defendant cannot change the venue after an order for time to plead, on the terms of pleading iſſuably and taking ſhort notice of trial for the firſt ſittings in *London* or *Middleſex*. *Shipley* v. *Cooper*, *T.* 38 *G.* 3. 698

VERDICT,
See TRESPASS, No. 2.

U.

USURY,
See WITNESS, No. 1.

1. The offence of uſury is not complete until the lender has actually received the exceſs

of intereſt in money or money's worth. *Maddock q. t.* v. *Hammett*, *E.* 37 *G.* 3. *Page* 184

2. Therefore if a promiſſory note be given for repayment of a ſum lent with uſurious intereſt, and the note when due be taken up and another note ſubſtituted for it, the offence of uſury is not thereby committed, nor is the penalty incurred until the latter note is paid. *ib.*

W.

WAGER.

1. If a ſum be depoſited upon the event of an illegal wager the loſer may recover back his depoſit even after the event has happened. *Lacauſſade* v. *White*, *E.* 38 *G.* 3. 535

WARRANT,
See COMMITMENT, No. 1.

WARRANT OF ATTORNEY.

1. When a defendant in cuſtody executes a warrant of attorney to confeſs a judgment, there muſt be an attorney preſent on his part: the preſence of the plaintiff's attorney is inſufficient, though the defendant conſent to his acting as his attorney alſo. *Hutſon* v. *Hutſon*, *M.* 37 *G.* 3. 7
2. But when a defendant is *in execution* his attorney need not be preſent. *Crompton* v. *Steward*, *M.* 37 *G.* 3. 19

WHARFINGER,
See PLEADING, No. 5, 6.

WILL,
See DEVISE. EVIDENCE, No. 5, 6.

WITNESS,
See EVIDENCE.

1. In an action for uſury, the borrower of the money is a competent witneſs to prove the whole caſe. *Smith q. t.* v. *Prager*, *M.* 37 *G.* 3. *Page* 60
2. A witneſs is not incompetent on the ground of intereſt, unleſs he be directly intereſted in the event of the ſuit, or can afterwards give the verdict in evidence in ſupport of his own intereſt. *Ib.* 62
3. If *A.* have received money from *B.* to pay to *C.*, and the queſtion be whether *A.* were the agent of *C.*: for that purpoſe *A.* may be called as a witneſs to prove the agency. *Ilderton* v. *Atkinſon*, *H.* 38 *G.* 3. 480
4. So a captain of a ſhip who had borrowed money for the uſe of the ſhip of the plaintiffs was held a competent witneſs to prove that fact in an action againſt the owners, whoſe defence was that he had borrowed it for his own uſe. *Evans* v. *Williams*, ſittings at *Guildhall* after *Trin* 28 *G.* 3. *cor.* Lord *Kenyon*. 481 *n.*
5. In an action by an indorſee of a bill of exchange againſt the acceptor, the latter may call the payee and indorſer as a witneſs to prove that the bill was void in its creation. *Jordaine* v. *Laſhbrooke*, *E.* 38 *G.* 3. 601

WRIT,
See EXCOMMUNICATION, No. 1, 2.

1. If the plaintiff prove a cauſe of action before the bill filed, though after the writ ſued out, it is ſufficient as well in the caſe of bailable as common writs. *Beſt* v. *Wilding*, *M.* 37 *G.* 3. 4
2. Where an action muſt be brought within three months, it is ſufficient for the plaintiff to prove a writ ſued out within ſuch time and his declaration within a year afterwards, without ſhewing ſuch writ returned. *Parſons* v. *King*, *M.* 37 *G.* 3. 6

END OF THE SEVENTH VOLUME.

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